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J. M. Anderson.

REPORTS OF CASES
DECIDED IN THE
COURT OF APPEAL.

DURING PARTS OF THE YEARS 1885 AND 1886.

**REPORTED UNDER THE AUTHORITY OF
THE LAW SOCIETY OF UPPER CANADA.**

VOLUME XII.

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ONTARIO APPEAL REPORTS.

BELL V. FRASER.

Loss by agent—Payment into court—Defence—Conditional payment—Satisfaction—Order XXVI. O. J. A.

The plaintiff, as assignee of an insolvent estate, claimed from the defendant, a creditor of the estate, an account as to his dealings with timber limits assigned to him as security, and payment of any balance. Part of the timber had been placed in the hands of K. & Co. for sale.

Held, upon the facts stated—[affirming the decision of FERGUSON, J.]—that the defendant was not liable for a loss occasioned by K. & Co.'s failure to pay over part of the price of the timber sold by them.

The defendant stated in his defence that in case the Court should be of opinion that he was liable for the payment of the balance, &c., he, the defendant, brought into Court the sum of \$4,300, saying that the same was sufficient to pay in full all claims of the plaintiff in respect of the balance, &c.; and paid into Court under his defence the said sum of \$4,300, which was withdrawn by the plaintiff after issue and before trial.

FERGUSON, J., although he held that the plaintiff was not entitled to recover, refused to order him to refund the \$4,300.

An appeal from such refusal was dismissed with costs, as the result of a division of opinion.

Per HAGARTY, C. J. O., and OSLER, J. A.—There was only one way in which this money could have been paid into Court, unless under a special order, viz., under Order XXVI. O. J. A.; the money was not paid in conditionally, but absolutely in satisfaction and as an alternative defence; and therefore it was properly withdrawn by the plaintiff.

Per BURTON and PATTERSON, JJ. A.—The defence of payment into Court set up, was not strictly pleadable, but was a notice to the plaintiff that the money was in Court to answer his demand, if he established it. Money paid into Court under a defence is not inevitably to be regarded as paid in under Order XXVI. O. J. A. The inference that payment into Court is made for immediate satisfaction, must yield to a direct notice, that it is not made for that purpose; and such notice sufficiently appearing from the pleading, the money was improperly withdrawn by the plaintiff.

AN appeal by the defendant from a portion of the judgment of Ferguson, J., refusing the defendant's application to compel the plaintiff to repay into Court the sum

of \$4,300 withdrawn by him ; and a cross-appeal by the plaintiff from such portion of the same judgment as dismissed the plaintiff's action, with costs.

The action was brought by the plaintiff, who was the assignee in insolvency of McDougall Brothers, against the defendant, a large creditor of the estate, who held valuable properties as security for his claim, for an account and payment to the plaintiff of the balance (if any) in defendant's hands, after payment of his own claim.

The sum of \$4,300 above mentioned was paid into Court by the defendant under a direction procured upon the following præcipe :

" Required direction for the bank to receive from Alexander Fraser, the defendant herein, or his solicitor, \$4,300, payable into Court to the credit of the plaintiff and the accountant of the High Court of Justice.

" Under (Rule 216) the defendant's statement of defence herein, dated 6th April, 1882."

The words (Rule 216) were inserted in the accountant's office.

That part of the statement of defence which related to the payment into Court was as follows :

" 9. In case this Honourable Court should be of opinion that the defendant is still liable for the payment of the balance of the money mentioned in the next preceding paragraph, the defendant now brings into Court ready to be given to the plaintiff the sum of \$4,300, and states that the same is sufficient to pay in full all claims of the plaintiff in respect of the balance, &c., and of all interest thereon, and of all damages for non-payment thereof, or for omission to credit the same on the defendant's claim, pursuant to the deed set out in the 7th paragraph of the plaintiff's statement of claim."

The plaintiff took the money out of Court, notwithstanding the language of the defence quoted, and Ferguson, J., although he held that the plaintiff was entitled to nothing, yet felt bound to refuse to order the plaintiff to re-pay the \$4,300.

The other facts of the case are fully set out, and the authorities are referred to in the present judgments.

The appeal was heard on the 14th day of May, 1885.*

McCarthy, Q. C., for the appellant.

Gormully, for the respondent and cross-appellant.

September 15, 1885. HAGARTY, C. J. O.—Two questions are presented for our decision. The Court below decided against plaintiff's claim, in effect that there was no cause of action.

But it was also held that a sum of \$4,300, paid into Court by defendant, as he says, to abide the determination of the suit, or the opinion of the Court, and which the plaintiff took out of Court, could not be refunded to defendant, although the judgment was that the plaintiff was entitled to nothing.

The defendant appeals against this latter view. The plaintiff cross-appeals that the Court below was wrong on the merits as to this sum, and that, apart from the payment into Court, the plaintiff was, entitled to a decree therefor.

If the cross-appeal be successful, it will be unnecessary to discuss the subject matter of defendant's appeal, except on the question of costs.

McDougall & Brother became insolvent in October, 1877.

In the May of that year a deed was executed between the insolvents and the defendant Fraser.

It recited that a large quantity of timber had been got out by the McDougalls on limits, jointly owned by J. L. McDougall and defendant.

That defendant, for their accommodation, had accepted large drafts, and they desired to secure him, &c.

And that he agreed to advance money to get the timber to Quebec.

They then assign the timber to him absolutely, but on trust to sell and dispose of it at Quebec, either for cash or

**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.

credit, during the year 1877, as may reasonably seem best to him, and out of proceeds to pay all charges, wages, and expenses, and to pay all the drafts and renewals, and to retain to himself all his advances, commission, &c.; balance, if any, to the McDougalls.

They agree to send the timber to Quebec at their own expense, and to place it in St. Lawrence docks, &c.

The timber was taken to Quebec, but, as is alleged, from the state of the market, lay there for several years unsold. It was placed in the hands of Messrs. Knight & Co., as brokers or agents for sale.

In July, 1881, a deed was executed between the plaintiff, as assignee, and the defendant, which is treated by all parties as a final arrangement of their accounts.

It was agreed that the limits should be sold at a reserved price of \$100,000.

Defendant was to receive the purchase money on certain trusts to pay himself one-half the total price.

Out of the other half to deduct \$58,003.08, the amount of his claim provable against the insolvent's estate, and the balance to plaintiff, as assignee.

Certain items of defendant's account were to be verified by vouchers.

The account sales of the timber by A. F. A. Knight & Co., to be verified at expense of estate, if required.

The balance of timber in the hands of Knight & Co., belonging to the estate, is shewn in above account sales as 48,030 feet 4-12 inches. On this Mr. Fraser has a lien for his claim, as aforesaid. If this shall be sold before the sale of the limits, the amount realized therefrom shall be deducted from the amount of Mr. Fraser's claim, as aforesaid. Mr. Knight's and other proper charges to be first deducted.

The limits were sold, and the whole question on this head is, whether a loss occasioned by Knight's failure to pay out of the sales of timber made by him a sum of about \$4,300 is to fall on defendant or on the estate.

Knight sold about \$84,700 worth, and paid over about half to the plaintiff, on order of defendant, directing him to pay all to plaintiff.

Plaintiff insists that he has nothing to do with Knight, who was employed by defendant, and that the latter must bear the loss on Knight's default.

According to Knight's testimony, the Macdougall raft came into his hands in the spring of 1879; the last shipments and sales were about August and September, 1881.

In October, 1881, plaintiff, with defendant, had an interview with Knight, and received an account from him.

An account dated 22nd November, 1881, at page 58, shows account sales of the timber limits; and the account due defendant, about \$58,000, was presented on behalf of plaintiff.

It was given to defendant, and plaintiff wrote at foot, "The above account does not include and is made without prejudice to the money payable by Fraser to Bell as assignee of the balance of raft timber sold by Fraser through the agency of Knight."

Mr. Gormully was acting for plaintiff. It seems to have been understood between them that Mr. Gormully should endeavor to get the money from Knight, on the understanding that his doing so should not prejudice their right to look therefor to defendant.

It does not seem that the defendant's solicitor specially agreed to anything as to ultimate liability.

25th November, 1881, Fraser wrote letter (Ex. E, p. 59) to Knight, authorizing him to pay all moneys to Bell, the plaintiff, arising from sales of any timber that was or is in his hands belonging to J. L. McDougall's estate.

29th November (Ex. F) Gormully wrote to Knight, enclosing copies of the authority, and asking for the money.

Knight replies 1st December (Ex. H) that he will remit in a few days.

Gormully also writes to defendant, stating that he had asked immediate payment from Knight, but that plaintiff held defendant responsible.

Knight paid plaintiff \$4,500 on account, on this authority from defendant.

The residue is the amount in dispute. This suit was commenced 14th February, 1882.

The learned Judge held, on the evidence, that "the defendant was justified in employing an agent or broker at Quebec for the sale of this timber, and entrusting to him the property and purchase money arising from the sale, as was done, and that defendant was not guilty of negligence in the selection of Knight & Co. as such agents or brokers, and I am of the opinion that defendant is not liable to make good the loss above mentioned."

The justice of the case is, in my opinion, clearly with defendant, and I hope there is no rigid rule of law to render him liable.

Defendant was certainly a trustee for sale of this timber when it reached his hands at Quebec. The original trusts are explicitly set out in the agreement with the Macdougalls of May, 1877. He appears to have dealt with it in every way as a prudent man would have dealt with his own property.

He trusted Knight largely with his own property, as well as with this timber. The evidence warrants the conclusion that Knight was a man in good standing, credit, and character.

The employment of such an agent as Knight appears to have been a reasonable and proper proceeding, especially for a person living in Westmeath, up the Ottawa River.

The learned Judge relied largely on the statement of the law so fully laid down in *Speight v. Gaunt*, 22 Ch. D. 727.

If defendant be not liable to any larger measure of responsibility than the unpaid trustee in that well reasoned case, his defence is clear.

I feel great difficulty in agreeing with the argument that he stands in any less defensible position.

The trust was to sell the timber for cash or on credit.

Had he sold it on credit to Knight, then a man of good standing, it could hardly be said that he would be liable.

On a trust like this, where the trustee, whether acting gratuitously, or interested, as he was, in the result of the sales, it is not easy to see why a larger measure of liability should be held to apply in the one case more than the other. In defendant's position he was interested more especially in making the most he could of the trust property.

Even if he were in the position of a mortgagee in possession, he would only be answerable, as Lord Westbury puts it in *Parkinson v. Hanbury*, L. R. 2 H. L. 1, 15 : "It is undoubtedly settled in the Courts of equity, that if a mortgagee, in that character, enters into receipt of the rents and profits, he will be bound to account, not only for what he has received, but for what, without wilful default, he might have received."

The case is very full on this head : 2 *Fisher on Mortgages* 948, sec. 1530 *et seq.*

I think the learned Judge was right in holding in defendant's favour.

The other branch of the case raises a curious question.

For some unexplained reason the defendant paid into Court the sum of \$4,300. His defence states, par. 9 : "In case this honourable Court should be of opinion that the defendant is still liable for the payment of the balance of the money mentioned in the next preceding paragraph, the defendant now brings into Court, ready to be given to the plaintiff, the sum of \$4,300, and states that the same is sufficient to pay in full all claims of the plaintiff in respect of the balance of the moneys received by the said A. F. A. Knight, mentioned in the seventh paragraph of this statement of defence, and of all interest thereon, and of all damages for non-payment thereof, or for omission to credit the same on the defendant's claim, pursuant to the deed set out in the seventh paragraph of the plaintiff's statement of claim."

Defendant's solicitor swears that he was instructed by counsel, and believed, that the limitations expressed in said statement of defence were sufficient in fact to prevent the payment of the money to plaintiff in case the Court should be of opinion that the defendant was not liable, and that notice was given to the accountant not to pay out any moneys in the suit.

I have had the advantage of reading my brother Osler's judgment on this branch, and agree with the views expressed by him.

There was only one way in which this money could have been paid into Court, viz., under the rule, except by some express direction given by the Court.

On the receipt and præcipe it is stated to be under the rule. We are told these words were added in the accountant's office. It matters little by whom the receipt was taken in that form. The parties paying had full notice it was so expressed to be paid, and before the trial it is admitted by defendant's solicitor that he was aware the plaintiff had taken the money out.

When defendant was aware of the money being taken out of Court, he should have applied with reasonable promptitude to the Court to correct any proved mistake. He should not, with this knowledge, have allowed the case to go to hearing.

I am unable to see any substantial difference between the expression, "in case the Court be of opinion the defendant is still liable, &c.," and such words as "without admitting any liability," "lest contrary to what the defendant believes and contends," and "if by reason of any wrongful act of defendant, his servants, &c., the plaintiff sustained damages," &c., &c.

When the person paying says, "if contrary to what he contends," must it not mean as here in substance the same as, "if in the opinion of the Court, &c.?" Is it not in both cases, as it were, "I am contending that I am not liable, but, if the Court think I am, then I pay the money into Court, &c.?"

As Brett, M.R., says, in *Wheeler v. United Telephone Co.*, 13 Q. B. D. 597, 613: "Whatever the exact form of the defence may be in words, the substance of it is, that the money is paid into Court, and the defence is pleaded as an alternative defence, which means that if the defendant fails in the other defences which he has set up, this is his defence to the action."

And as Bowen, L. J., says (p. 613): "If this were not so the defence would be incomprehensible, for why should anyone pay money into Court when he can gain nothing by it?"

Here the money is paid into Court "to the credit of the plaintiff and the accountant of the High Court of Justice." The defence says that it is sufficient to pay all claims of plaintiff in respect of the balance of moneys received by Knight, and of all interest thereon and damages for non-payment.

It is conceded that the interest was calculated up to 6th April, 1882, when it was paid into Court "ready to be given to the plaintiff."

If it were merely designed to abide the decision of the Court, which might not be ascertained for another year, the sum paid in could not be in full of a specific sum, and interest, and all damages for non-payment.

It must be borne in mind that this is not a motion to correct an error. It is an appeal from a judgment refusing to order a return of the money as a result of the general decision in defendant's favour.

The Rules of 1884, adopted in England, provide distinctly for payments of this character. See the case of *Savage v. Payne, Re Lord Stamford*, 33 W. R. 909. Our early adoption of these rules would seem very advisable.

BURTON, J. A.—Upon the defendant's appeal, I find myself unable to agree in the conclusion arrived at by the learned Chief Justice and my brother Osler. The question now raised is not decided by any of the cases in England or Ireland to which we have been referred, although there are *dicta*, and especially of Lord Justice Bowen, in *Goutard v. Carr*, 13 Q. B. D. 598*n*, which would seem to bear out the contention of the plaintiff.

In none of those cases did the point now before us come up for decision. The case nearest to it is that in the Irish Courts, *Coughlan v. Morris*, 6 L. R. Irish 405, but the language of the plea was different. The Court there held that the prefatory words of the plea, "lest, contrary

to what the defendant contends and believes, he is under liability to the plaintiff," did not involve any substantive statement of fact, or render the defence conditional only upon the plaintiff's admitting its truth, that is, accepting the amount in full satisfaction. So that in effect the plea was treated as amounting to nothing more than a plea of payment into Court, coupled with a denial of the cause of action in respect of which it was pleaded; and that being so, the cases, to which I shall presently refer somewhat more in detail, seem to establish that no change has been made by the Judicature Act as to the effect of such a payment, but that the money so paid in becomes absolutely the property of the plaintiff, although it may turn out upon the trial of the action that the plaintiff had no cause of action at all, and was consequently not entitled to the money so paid in. In England the rules have been amended so as to prohibit the taking out of the money where the cause of action is denied until the case is finally disposed of.

The question here is, whether the plea does not go further; and for the purpose of the argument I will assume that this plea does state in the clearest and most explicit manner that the money is deposited in Court not to be treated as the plaintiff's except in the one contingency, that his claim is established, when, and to the extent to which it may be established, it is appropriated to the satisfaction of the plaintiff's claim.

I do not say such would be a good plea under the statute, nor, for that matter, that it would be a plea at all; but, granting that it is a nullity, I am at a loss to understand upon what principle the plaintiff becomes entitled to appropriate the money so paid in, and which he is notified is so paid in to abide the result of the suit.

Berdan v. Greenwood, 3 Ex. D. 251, as I read it, decides nothing more than this, that since the Judicature Acts a plea of payment into Court, at the same time that the cause of action in respect of which it is paid in is denied, is allowable.

It is to my mind a most beneficial change, and I have no doubt will be attended with good results, for it must have been the experience of all of us when in practice that we were frequently induced to advise against a payment into Court of a sum which our instructions led us to believe ample to satisfy the plaintiff's demand, because we felt we were thereby abandoning a safe ground of defence in denying *in toto* the plaintiff's cause of action.

But the Judicature Act and the orders enacted no new law conferring any further rights of defence by paying money into Court than formerly existed, except that it enabled a defendant to do so without abandoning any answer he might have to the cause of action in respect of which it was pleaded, leaving the plaintiff at liberty, as before, to take the money out of Court in satisfaction of his entire cause of action, and to sign judgment and tax his costs, or to take it *pro tanto*, and go on with the action for the purpose of recovering something more.

In *Goutard v. Carr*, in the Court of Appeal, to be found in a note to *Wheeler v. The United Telephone Co.*, 13 Q. B. D. 597, the plea was not guarded as it is in the present case; but in addition to the denial of the plaintiff's cause of action, the plaintiff brought into Court a sum, which he alleged to be sufficient to satisfy the plaintiff's claim. I have no doubt that in that case it was an unqualified payment into Court, which entitled the plaintiff at once to take it out and go on for the difference claimed; and as the payment operated so far as that portion of the defence was concerned as an admission of liability, I think the conclusion arrived at as to the disposition of the costs was correct; but in delivering judgment, some of the Judges used expressions which apparently countenance the view for which the plaintiff here contends, viz., that, although the payment is accompanied by an unequivocal and explicit statement in the plea that the defendant not only denies the plaintiff's cause of action, but brings money into Court, to be paid over only in the contingency of the plaintiff obtaining judgment, the condition is to be

disregarded, and that the plaintiff becomes at once entitled to take out the money.

I can understand that such a plea may be improper, and liable to be objected to as a plea of payment into Court not warranted by the statute, and I can understand that the officer of the Court would be justified in refusing to receive it; but I confess myself at a loss to understand, why the mere fact that the officer does not object to receive it, and does receive it, can entitle the plaintiff to appropriate it when he has been notified, as clearly as language can express it, that it is not intended to be paid to him.

Whatever may be the effect *prima facie*, and without more, of paying money into Court, under order 26, must necessarily be controlled (whether the pleading be good or bad) by the express statement made in the notice contained in it, that it is paid into Court to abide the result of the litigation, and is to be paid over to the plaintiff only in the event of a decision in his favour. If the argument be good, it must amount to this, as I have already suggested, that however guarded may be the language in which the payment is made, for the simple reason that it is paid in under a rule which authorizes the payment out to the plaintiff of moneys paid in under it, the plaintiff becomes entitled to receive and retain it.

I do not think the law can be so unreasonable, nor do I think the eminent Judges whose *dicta* I have quoted would have used the language they did, if the precise case we are now considering had been before them for decision; but until compelled so to decide by a decision binding upon me, I must decline to do so. The officer, no doubt, would be protected, because it is no part of his duty to scrutinize the pleading.

It is not a plea of payment into Court within the meaning of the statute and the order; but although irregular and, so far as I can judge, a useless procedure, I can see nothing whatever to warrant the plaintiff in construing a conditional payment into Court as an absolute one.

In *Wheeler v. The United Telephone Co.*, above referred to, the plea was simply a payment into Court, with a denial of the cause of action in respect of which it was pleaded.

In the present case I think the language of the plea is sufficiently explicit, shewing not merely a denial of the cause of action, but a statement that, if that should be proved to exist, the damages do not exceed a certain sum, and then bringing voluntarily into Court a sum sufficient to pay those damages if awarded, to my mind an unnecessary proceeding, and not strictly the subject of a plea at all, although I can imagine a case in which the power thus to pay in money might be useful, as for instance, when a defendant being suddenly compelled to leave the country, and being apprehensive of arrest, might anticipate any unpleasant proceeding of that nature by voluntarily bringing the money into Court to await the result; but although not strictly pleadable, it may well be regarded as a notice to the plaintiff that I have paid this sum into Court under the only machinery which the Court allows, but I wish you to be under no misapprehension about it. It is not paid in absolutely and unconditionally, but will be there ready to answer your demand if you establish it. To hold that, under such circumstances, a plaintiff can take the money out without complying with the condition, and that the Court is powerless to compel its restitution would, as it appears to me, be a return to technicalities of the strictest kind. I think, therefore, that unless the plaintiff can succeed upon his cross-appeal, there should be a reversal of the judgment below, and an order upon the plaintiff to restore the money withdrawn, and interest.

Upon the subject of the cross-appeal I have felt great doubt, not because I questioned the soundness of the learned Judge's views upon the law as laid down in his judgment, but because I have not been clearly convinced of its application to the facts of this case, or that such a defence was open upon the pleadings.

No such defence was in the pleader's mind when he drew the answer, which seems to assume that there would be no defence, but for the agreement of the plaintiff to look to Knight for the payment of the balance. If that defence were not established, or, as the defendant puts it, "if he, the defendant, is *still* liable for the payment of that balance," he brings money into Court. I should have thought, therefore, that the defendant intended to rely upon that as his only defence, failing which the plaintiff would be entitled to the money. As my learned brothers, however, have come to the conclusion that the question of liability is still open, even if the defence, apparently relied upon by the defendant, fails, and that there was no liability under the circumstances to make good the loss, I have not thought it necessary to go into the evidence, as my opinion cannot affect the result. I therefore express no opinion upon that branch of the case.

In the result the cross-appeal fails, and the plaintiff having failed to establish any cause of action, should be ordered to bring into Court the money improperly withdrawn.

PATTERSON, J. A.—An agreement was made between the defendant and the plaintiff, as assignee in insolvency of the estate of John Lorne McDougall & Brother, respecting the sale of timber limits, of which the defendant owned one undivided half, and the plaintiff the other undivided half subject to a charge in favour of the defendant. The defendant was to sell the limits, pay himself one half of the price received, and pay over the other half to the plaintiff, after deducting from it his claim against the insolvent estate, which was something over \$58,000. But if some 48,000 feet of timber belonging to the estate, which was in the hands of A. F. A. Knight, of Quebec, for sale, should be sold before the sale of the limits, the amount realized therefrom was to be deducted from the \$58,000 claim of the defendant.

The plaintiff's complaint, in the ninth paragraph of his statement of claim, is, that although Knight had sold the timber before the defendant sold the limits the defendant did not credit the amount realized, but retained the whole \$58,000.

In answer to this the defendant alleges that being informed, after the sale of the limits, that Knight had sold the timber for \$8,470, he gave the plaintiff an order upon Knight for that money: that the plaintiff accepted the order and applied for the money to Knight, who paid him \$4,500 on account of the \$8,470; and he submits that the plaintiff thereby agreed to look to Knight for the payment of the balance, and discharged the defendant from payment of the same.

Then he adds the paragraph which, in connection with the payment of \$4,300 into Court and the payment of it out to the plaintiff, has given rise to so much controversy.

The paragraph is in these words: "9. In case this honourable Court should be of opinion that the defendant is still liable for the payment of the balance of the money mentioned in the next preceding paragraph, the defendant now brings into Court, ready to be given to the plaintiff, the sum of \$4,300, and states that the same is sufficient to pay in full all claims of the plaintiff in respect of the balance of the moneys received by the said A. F. A. Knight, mentioned in the seventh paragraph of this statement of defence, and of all interest thereon, and of all damages for non-payment thereof, or for omission to credit the same on the defendant's claim, pursuant to the deed set out in the seventh paragraph of the plaintiff's statement of claim."

The Court decided against the liability of the defendant, but the plaintiff insists, notwithstanding that decision, on his right to retain the \$4,300.

I have not been convinced that he has any such right.

It is certainly not found in the terms of the ninth paragraph which, read without the light supposed to be reflected from elsewhere, say that the money is to be given to the plaintiff in case the Court holds the defendant liable, an event which has not happened. .

The reflected light is supposed to come from one or more of the Judicature Act rules under order XXVI., which professes to deal with "Payment into Court in satisfaction." Rule 1, which has the marginal number 215, is identical with the English rule 1, under Order XXX., of the rules of 1875.

It provides that, "Where any action is brought to recover a debt or damages, any defendant may at any time after service of the writ, and before or at the time of delivering his defence, or by leave of the Court or a Judge at any later time, pay into Court a sum of money by way of satisfaction or amends. Payment into Court shall be pleaded in the defence, and the claim or cause of action in respect of which such payment shall be made shall be specified therein." Rule 2 or 216 directs that, "Such sum of money shall be paid as hitherto into the proper bank or to the proper officer, and the proper officer shall give a receipt for the same."

The proper officer is the accountant, whose office is regulated by order LVI. Rule 2 of that order, with marginal number 476, enacts that section 121 of the C. L. P. Act shall apply to the suitors' accounts in the accountant's charge; and one provision of section 121 is, that where money is paid in under a plea of payment into Court, the clerk (now the accountant), on the production of the receipt of the bank for the money, or other satisfactory proof of such payment, shall sign a receipt for the amount in the margin of the plea.

It must, as I think, be taken to be beyond dispute that no payment is contemplated or intended to be dealt with by these rules, except that which is expressed by the heading of Order XXVI., "Payment into Court in satisfaction;" and rules 2 and 3, or marginal numbers 217 and 218 which provide for payment out of Court, shew that the payment in the mind of the framer of the rules was a payment irrevocably appropriated to the plaintiff, and which he was at liberty at once to accept in satisfaction; or perhaps to take merely on account, and proceed for more, though this may not be indisputable.

The absence of authority in the officer to receive money on any other terms is made use of in the argument on which one of the cases to which I shall refer was decided.

So far, the law respecting payment into Court, as it is expressed in Order XXVI., is essentially the same as it was under the C. L. P. Act, R. S. O., ch. 50, sec. 108, except that there were certain actions for damages to which the right given by that section did not extend.

Order XXVI. does not touch the question of the right to plead, along with payment into Court, a denial of the plaintiff's right of action; but the effect of the removal by the Judicature Act of the restraint which existed under the English C. L. P. Acts, and under our C. L. P. Act of 1856, upon the liberty of pleading inconsistent defences, is to leave a defendant free to deny the liability in satisfaction of which he pays money into Court.

I am not aware that such a right was ever asserted in practice in this Province before the Judicature Act, although the reasoning on which it is now recognized would apparently have had the same force ever since 1871, when the Act 34 Vict. ch. 12, sec. 8, declared: "That it shall and may be lawful to plead any number of pleas, replications, avowries, cognizances, or other pleadings, without leave of the Court or a Judge; provided always that the opposite party shall be at liberty to apply to the Court or a Judge to strike out any plea upon the ground of embarrassment or delay."

But whether this rule of pleading dates with us, as in England, only from the passing of the Judicature Act, or may have been latent in our earlier legislation, it will be useful to notice the extent to which the English cases to which I am about to refer turned upon an aspect of the discussion which is not directly involved in the question we have to decide.

What is that question? Granted the intention of the Legislature to provide in Order XXVI. for payment into Court in satisfaction only, and so that the plaintiff may immediately take the money and keep it; granted, also,

that the officer is only authorized to receive a payment of that kind, and which payment is stated in the defence to be of that kind—for I take these two last propositions to be inseparable—does it follow that when a payment which is stated in the defence not to be for immediate satisfaction of the plaintiff, but only for his ultimate satisfaction if he fulfils the expressed condition of obtaining a judgment declaring his right to it, is, without legal authority, paid to and received by the officer, the plaintiff, who has in his hand the written declaration of the terms on which the payment is made, can insist on immediate payment out of Court, or, having managed to get it, but having failed to establish his right, can insist on retaining it?

No argument can be necessary to prove that such a claim cannot be supported on any principle of justice; and the inquiry is really narrowed to the construction of the statement in the ninth paragraph of the defence, in view of its language and of the rules said to be settled by the cases.

The possibility of paying money into Court without irrevocably appropriating it to the plaintiff is illustrated by cases before the Judicature Act, but under the Act 6 and 7 Vict. ch. 96, sec. 2, (our equivalent of which is R. S. O. ch. 56, secs. 4 and 5,) which, in actions for libel contained in a public newspaper, authorized a plea that the libel was inserted without actual malice and without gross negligence, and that a full apology had been inserted; and provided that every defendant, upon filing such a plea should be at liberty to pay into Court a sum of money by way of amends for the injury sustained by the publication of the libel; and further, that "such payment into Court shall be of the same effect, and be available in the same manner and to the same extent, and be subject to the same rules and regulations as to payment of costs and the form of pleading, except so far as regards the pleading of additional facts hereinbefore required to be pleaded by such defendant, as if actions for libel had not been excepted from personal actions in which it is lawful to pay money into Court under 3 and 4 Wm. IV. ch. 42."

In *Lafone v. Smith*, 4 H. & N. 158, the defendant pleaded under the statute, and paid forty shillings into Court. The jury found the apology insufficient, and assessed one shilling damages. The question was the plaintiff's right to costs, he having recovered by the verdict of the jury less than forty shillings. Pollock, C. B., said, with reference to the 6 and 7 Vict. ch. 96, "That statute will not assist the plaintiff. The payment into Court was conditional. The plea not being proved, the payment into Court was not warranted by law, and the defendant ought to have his money back again. Damages should have been assessed wholly irrespective of the plea."

Jones v. Mackie, L. R. 3 Ex. 1, was a similar case. Channell, B., said during the argument: "This plea not being proved, no liability is admitted. The defendant in effect says, 'I published this libel without malice, or negligence, and if you will accept my apology I will give you £5.' But he does not bind himself to give anything if his terms are not accepted. His admission of liability is conditional and not absolute."

The motion was against the ruling of Bovill, C. J., who had told the jury to assess damages irrespective of the amount paid into Court, and the jury had assessed them at twenty shillings while £5 had been paid into Court. The direction was held to be right, Kelly, C. B., who gave judgment, saying that it was immaterial to that application whether the plaintiff or the defendant was entitled to the £5 which was still in Court.

In *Spurr v. Hall*, 2 Q. B. D. 615, it was held that Order XXX, rule 1, of the Rules of 1875, did not permit a defendant in an action for nuisance raising a question of title, to plead payment into Court and to deny the plaintiff's right of action in respect of the same part of his claim; and that the statement of defence containing such a plea should be amended as embarrassing under Order XXXII., rule 1 (Ont., rule 178). The case has no direct bearing on our inquiry.

Berdan v. Greenwood, 3 Ex. D. 251, in the Court of Appeal, may be called the leading case on the order. A

plea of payment into Court had been disallowed as pleaded concurrently with other defences to the same cause of action, one of which was a defence on the allegation of fraud, by Field, J., whose judgment had been affirmed by the Exchequer Division. The question in appeal was, therefore, strictly only the right to plead the defences together; but the judgment was not confined to that topic. The plea of payment was in these terms: "Lest, contrary to what the defendant believes and contends, he is under any liability to the plaintiff, he brings into Court the sum of £130, and says that the said sum is enough to satisfy the plaintiff's claim in respect of the matters herein pleaded to." Lord Justice Thesiger, delivering the judgment of himself and Brett, L. J., said there were two questions: first, whether in any case, or in all cases, under the Judicature Acts and orders, a payment into Court, at the same time that the cause of action in respect of which it is paid in is denied, should be allowed; the second, whether, assuming such a payment to be in some but not in all cases proper, the present was one of those cases. The discussion of both points turned chiefly on Order XXVII, and on the consideration whether or not the pleading was embarrassing; but Order XXX. was considered, and it was held, on grounds like those which I have already stated, that inconsistent defences were not forbidden. "It is suggested," the Lord Justice remarked (p. 225) "that money is not paid into Court by way of satisfaction or amends, within the meaning of Rule 1 of Order XXX., when it is paid into Court in respect of a cause of action which the defendant does not admit to exist in fact. Such an argument does not, however, appear to us well founded. The sum paid in is (as has been admitted on the part of the defendant's counsel to be the effect in this action) absolutely appropriated to the purpose of satisfaction or amends. The plaintiff may obtain the payment of it out to himself in manner provided by the third rule," &c., &c. Farther on he says (p. 257): "Is there, then, anything inherently unjust in a defendant paying money into Court in respect of a cause of action, which at the same time he by his pleadings denies to exist? As a general proposition, we should answer, nothing, while there is much to be said in favour of

it. Is it just in principle as regards a defendant who considers that he has a good defence on the merits, but who is desirous, if possible, of terminating litigation by a payment of money, that he should be forbidden to adopt this prudent course, except under the penalty of a complete admission of a cause of action which he honestly disputes?" &c., &c.; and he closed the discussion by the observation (p. 259): "We think that, apart from anything in the Judicature Acts or orders to compel us to do so, no predilection in favour of the old theories of consistent records should induce us to preclude defendants in actions from saying and doing that which, as practical men, before the action they might reasonably say and do, namely, say that they entirely deny a person's right to sue them, yet pay, or offer to pay, a sum of money as the price of peace and for the prevention of further litigation." The expression adopted by the learned Judge whose judgment we are considering, occurs in a passage where the Lord Justice, discussing the question of embarrassment, remarked (p. 257), quite consistently with the concluding words which I have just quoted: "The record, therefore, only shews that the plaintiff has obtained, through the timidity of the defendant, something which he had no right to obtain."

Now, I do not see that this judgment touches the question I have proposed for consideration. It proceeds on the clear understanding, as a fact, that the money was paid into Court deliberately and intentionally as within the object and design of Order XXX. The question was, whether the defendant who had done that could be allowed at the same time to deny his liability. With us the intention that the plaintiff should have the money before proving his right is not admitted, but denied. Far from making or intending to make the payment to buy peace or prevent further litigation, the defendant challenges the plaintiff to proceed with the litigation, and makes his right to the money conditional on the result. Cotton, L. J., while agreeing that the impeached paragraph of the statement of defence ought not to be struck out under Order XXVII., as tending to prejudice, embarrass, or delay the fair trial of the action, even if the paragraph

was to be considered as technically a plea of payment into Court, expressed his opinion that it was not a plea of payment into Court within the 71st section of the C. L. P. Act, 1852.

Hawkesley v. Bradshaw, 5 Q. B. D. 302, in which the Court of Appeal, overruling the Queen's Bench Division, held that in an action for libel published in a newspaper, an apology and payment into Court could be pleaded along with a justification, adds nothing to *Berdan v. Greenwood*, beyond making it perfectly clear that the payment into Court which they discussed was a payment actually, and not by any forced construction of the language of a pleading, understood to be intended as a payment by way of satisfaction or amends. Referring to *Berdan v. Greenwood*, Thesiger, L. J., said, (p. 305): "I need not repeat what was there said. It is sufficient for me here to say that the rule is founded upon the principle that when a man is threatened with an action, if he thinks proper to stop that action by a payment of money he should be entitled to do so, and should not be prevented at the same time from saying that the plaintiff has no cause of action."

It may be worth while to note, though perhaps merely a matter of words, that in discussing in *Hawkesley v. Bradshaw* the right to set up inconsistent defences, Cockburn, C. J., and Manisty, J., hold that a plea of payment is not properly a defence: 5 Q. B. D. 24, 25.

In *Coughlan v. Morris*, 6 L. R. Irish 29, and in Appeal, 405, the paragraph was exactly like that in *Berdan v. Greenwood*: "Lest, contrary to what the defendant believes and contends," &c. The plaintiff there had taken the money out of Court, and the application was to compel him to restore it to abide the result. A majority of the Court of Appeal held the plaintiff entitled to the money absolutely, May, C. J., dissenting, and holding that the money ought to be relodged.

The case goes farther than *Berdan v. Greenwood*, inasmuch as it was held, contrary to the contention of the defendant, that he had irrevocably appropriated the money

to the plaintiff. The decision can be taken to bear on this case only so far as the construction of the language used in the two pleadings can be held to be the same. But the difference is obvious. It can without violence be held that the defendant in the Irish case meant what it was admitted in the *Berdan Case* was meant by the very same form of expression, namely, that rather than risk the consequence of failure in the defence which he asserted he paid the money into Court.

As far as the cases actually decide anything, we should, almost of course, accept them as conclusive on the same state of facts or pleadings; but the language before us is not the same. Add to this the circumstance that the expression "Lest, contrary to what I believe and contend," &c., was in those cases susceptible of a different treatment from that agreed on by the majority in each Court, as appears from the opinions of Lord Justice Cotton and Chief Justice May, in connection with which we may bear in mind the different views held by Cockburn, C. J., Manisty, J., and others on other aspects of the question. Thus it is plain that the cases are no authority for our giving to the words we have to construe the same interpretation as was given to different words in other cases.

A case apparently more in favour of the plaintiff's contention is *Goutard v. Carr*, reported in a note to *Wheeler v. United Telephone Co.*, 13 Q. B. D. 597, and *Wheeler's Case* itself is also relied on.

I think an examination of those cases will result in shewing that they do not solve our question. I do not think they decide that money paid into Court must inevitably be regarded as simply paid in under Order XXX. of the English Supreme Court Orders of 1875, or our Order XXVI. to be taken by the plaintiff in satisfaction or part satisfaction of his claim, notwithstanding that the defence may state in the most explicit manner that it is not paid in upon any such understanding, and is not to be given to the plaintiff unless he establishes his right to it by the judgment of the Court.

I am not at this moment asserting that the defence in the present case contains such an explicit statement. I am dealing with the abstract proposition only. My point is that if the inevitable effect of the payment of money to the officer of the Court is to entitle the plaintiff to it at once and absolutely, no matter how plainly the defendant who pays it declares that he does not intend to appropriate it to the plaintiff immediately, or until the performance of the expressed condition, *cadit questio*; but if the declared intention is to be regarded, then the construction of the pleading must receive attention. I do not put the question as, necessarily, whether money can be paid into Court under Order XXVI. with any but the one result. Granting, for argument's sake, that it cannot, the concession touches only the form of the question, which may then be: Was the money paid in under that order?

The substantial inquiry, in either way of putting it, is the intimation as to the purpose for which the money is paid, given to the plaintiff by the action of the defendant, of which action the pleading is a factor that cannot be wholly disregarded, even if it should not be the controlling one.

In *Goutard v. Carr* one defendant had paid money into Court, pleading that, "If by reason of any wrongful act of himself, his servants, agents, or workmen, the plaintiffs sustained damages, as in the statement of claim alleged, the sum of £190 is sufficient to satisfy the plaintiffs' claim in respect thereof." The arbitrator to whom the action was referred found that the sum paid into Court was enough to satisfy the plaintiffs' claim, and he found all the other issues for the plaintiffs. The costs were to abide the event, and the question was, which party was entitled to the general costs. Williams, J., gave them to the plaintiffs, giving the defendant only the costs of the issue whether the money paid into Court was sufficient, and the Queen's Bench Division affirmed his judgment. In appeal the reverse was held; the defendant got the general costs, and the plaintiff only the costs of the issues

on which he succeeded. In this contest for the costs, it will be observed that the defendant was insisting that the payment was under Order XXX., and that the plaintiff might and should have accepted the money in satisfaction, and stopped the action. The judgment in appeal affirmed, in favour of the defendant, his reading of his own plea. The ground of the judgment is, I think, pretty fully expressed in a short extract which I shall read from the judgment of Brett, M. R. He said (p. 600): "Williams, J., seems to have thought that, in consequence of the expressions used in the pleading, the money was not paid into Court in satisfaction, and that the plaintiffs would not have been able to take it out of Court, but I am unable to agree with him in this respect. The money could not have been paid into Court, and the officer would have had no authority to receive it, and such payment would have had no effect whatever, except it was paid in under Order XXX., Rule 1, and it cannot, I think, be denied that, when paid into Court under that rule it was a payment in satisfaction of the cause of action to which it was pleaded, and by Rules 3 and 4 it would be paid out to the plaintiffs." The same reasoning is repeated by the Lords Justices Baggallay and Bowen. The latter referred to the history of payment into Court, and added (p. 601): "That is how payment into Court stood until the Judicature Acts and Order XXX., rule 1. That rule deals with payment into Court 'by way of satisfaction or amends.' Reading that with the light of sec. 71 of the C. L. P. Act, 1852, it gives a defendant power to pay money into Court in satisfaction and in bar of the plaintiff's claim, and such payment is to be pleaded as a defence, and unless it can be so pleaded I do not know the meaning of that rule 1. Then the money may be paid out to the plaintiff under rule 4, and the practice has been inveterate never to allow the money to be paid into Court unless paid into Court in the prescribed manner." I quote this passage partly because I may again refer to the reasoning which, if the language is correctly reported, seems to depend to some extent on what appears to me a rather free reading of the order which directs the payment to be pleaded *in the defence* not *as a defence*; but chiefly for the sake of the concluding words, where stress is laid on the practice which is spoken of as having become invete-

rate. This can scarcely be said of practice under so recent a measure as the Judicature Act; and from this circumstance, combined with the reference to the C. L. P. Act, I imagine that the opinion of the Lord Justice may not have been uninfluenced by some of that predilection for old theories which was deprecated by Lord Justice Thesiger in *Berdan v. Greenwood*. Lord Justice Bowen continued thus: "The Judicature Acts have altered the rules, so that money may be paid into Court with pleadings traversing the plaintiff's right of action. It is said by Williams, J., that there are different modes of defences with payment into Court, in one the money is paid with a confession of the plaintiff's right of action, in another where it is paid in full satisfaction of the claim, but without admitting the claim, and lastly, where the claim is denied and the money is paid conditionally only on the claim being established. Now I do not deny that there may be many ways of drawing the pleadings, and that some of the ways may be bad, but I do not think it possible to have paid money into Court in this action, except under Order XXX., rule 1, and I concur in the view of the present Master of the Rolls, and Thesiger, L. J., of the effect of such payment as expressed in their judgment delivered by the latter in *Berdan v. Greenwood*."

I do not understand the judgment in this case of *Goutard v. Carr* to lay down the rule that the terms of the defendant's pleading are to be disregarded. For the reasons given by the Lords Justices, the cogency of which may perhaps be open to question, they held that the money was paid into Court under Order XXX., and was governed altogether by the terms of the rules under that order. In the language of Bowen, L. J., it was not thought possible to have paid money into Court *in that action* except under the order.

The question arose in precisely the same way in *Wheeler v. United Telephone Co.* Williams, J., without having seen the judgment of the Court of Appeal in *Goutard v. Carr*, held that the money was for the plaintiff only on condition of his establishing the defendant's liability. He discussed the subject in an elaborate judgment which,

though of course wanting in the authority of the judgment of the Court of Appeal, commends itself to me as more in accord with the spirit of the Judicature Act than that of the higher Court, in which so much force is given to the technical import of a formal Act. In reversing the judgment, the Court of Appeal simply followed its own judgment in *Goutard v. Carr*. Brett, M.R., said, (p. 613): "Whatever the exact form of the defence may be in words, the substance of it is that the money is paid into Court, and the defence is pleaded as an alternative defence, which means that if the defendant fails in the other defences which he has set up, this is his defence to the action. If it succeeds the result is the same as if under the old system of pleading the jury had found in favour of one plea which went to the whole cause of action. In that case there would be verdict and judgment for the defendant, but the plaintiff would be entitled to the costs of issues raised by the other alternative defences which had failed." Bearing in mind that the matter for decision was the costs of the issues, and reading this language with reference to that subject, it may not be impossible to follow the reasoning; but, if we take it as a statement of a more general character, I confess my inability to understand it. By alternative defences I understand defences on different grounds, which may or may not be consistent with each other, but the defendant who pleads them being at liberty to rely upon any one of them, whether he can sustain the others or not. But it is out of the question to say that a defendant who has paid off the plaintiff's claim in full as one of his so-called defences, can, as an alternative defence, put the plaintiff to the proof of his claim, or himself go into evidence to prove that he had paid it before.

Payment into Court may be made without admitting that the plaintiff has a lawful right to the money which the defendant, to purchase peace or for some other sufficient motive, is content to pay him, so that, before recovering anything beyond what the defendant is so content to pay, the plaintiff must establish his cause of action, but this does not involve an alternative defence. No defence is made to the part of the cause of action which the

defendant satisfies by his payment. The defence which the Judicature Act permits, and which under the old rules was not permitted, is to the cause of action so far as damages *ultra* are claimed. But that is not an alternative defence.

I think the proper understanding of both the cases of *Goutard v. Carr*, and *Wheeler v. United Telephone Co.*, is that, under the facts, the payment into Court was construed to be a payment under Order XXX., and the expressions in the pleading treated as merely intimating that the claim was paid without admitting its validity, but not as making the payment conditional. This is, I think, borne out by what was said in the latter case by Bowen, L. J., and by Fry, L. J., who shewed, as had been also made apparent in *Goutard v. Carr*, that the conclusion was influenced by reasoning from conduct as well as from the terms of the pleading. Thus Bowen, L. J., said (p. 613): "When such a defence as this is pleaded, and money is paid into Court, it was there (*i. e.*, in *Goutard v. Carr*) decided that such payment should be treated as a payment into Court according to what was prescribed by Order XXX. of the Rules of 1875. If this were not so the defence would be incomprehensible, for why should anyone pay money into Court where he can gain nothing by it? But when the defendant has the benefit of what is treated as an alternative defence, there is some reason for paying into Court." This, in my opinion, hits the salient feature of the case, so far as conduct enters into the consideration. But it invites two observations. Conduct which, unexplained, may seem so incomprehensible, except on one theory, as to appear to be conclusive evidence in support of the theory, may, when explained, be seen in a different light. Payment into Court, except as immediate satisfaction, may seem so purposeless that anyone would infer it to be intended for immediate satisfaction. But that inference must yield to a direct notice accompanying the payment that it is not made for that purpose. It is a question of evidence, and it was so treated by Fry, L. J., when he said (p. 614): "Mr. Fillan has argued

on the mere construction of the defence, but the admission by payment into Court is more potent than the denial of liability." The admission here does not mean admission of liability, as the language might be taken to imply because the liability was in terms denied. It must mean admission of an intention that the payment should be taken in satisfaction, notwithstanding the denial of liability.

The other observation I make is, that while the term "alternative defence" seems to me improperly applied to payment in satisfaction, it is less inappropriate to the position taken by the defendant before us, though not even then very precise. He says, "establish your claim; and, if you do so, I say \$4,300 will cover it, and I bring that amount into Court to abide the event."

It is true that the defendant may gain nothing by this proceeding; but the question is what he has done—not whether he was wise or unwise in doing it.

Now, one word as to our Order XXVI. I am not disposed to deny that where the language of the pleading is ambiguous, and may signify only that the liability is not admitted without amounting to a condition attached to the payment, the presumption should be made that the payment is under the order; and there being no express authority to the officer to receive money with a defence, except under that order, I do not say that the officer is to be blamed for not closely reading and construing the pleading, or, indeed, that it is any part of his duty to do so.

If he did so, and saw that the case was not brought by the pleading within the terms of the order, it would be his duty to refuse to take the money; but the responsibility of so inspecting the pleading could not reasonably be thrown upon him.

With the plaintiff the matter takes a different shape. He knows the terms of the defence, and if they do not entitle him to take the money he cannot gain such a right by the error of the officer in receiving it, or by the accident that the solicitor or his clerk who hands the

money to the officer is not aware of the precise effect of the orders or rules.

What occurs between the solicitor or his clerk and the officer can be of consequence in only one of two ways—by its technical effect, or as evidence of intention which binds the client.

It cannot, in my judgment, have any technical effect at variance with the terms of the pleading, inasmuch as the pleading is the direct and authoritative notice to the plaintiff of the purpose of the payment. Nor do I know on what principle it can be taken to bind the client by evincing an intention different from that which the pleading asserts.

The proposition in the latter shape would be that the money was in truth meant for the immediate acceptance of the plaintiff, notwithstanding that the pleading asserted the contrary. But if we put it on the footing of evidence, we must not forget that we have that intention disproved as a fact by the affidavits of Mr. Christie and Mr. Gwynne.

The payment here was made in April, 1882. *Wheeler v. United Telephone Co.* was not decided till two years later, and *Goutard v. Carr*, if decided, was not reported. Having regard to the remarks I have made on the effect of the decision in *Berdan v. Greenwood*, and on the Irish case of *Coughlan v. Morris*, and to the difference of opinion amongst the Judges in both the English and Irish Courts, and even going so far as to credit the clerk of the solicitor's town agent who paid in the money with a knowledge of the state of opinion as it then stood, the idea of ascribing to his act more than its narrowest technical effect must be out of the question.

Let us suppose a case which is possible, though not very likely to happen. A defendant who has made default in pleading is let in by a Judge's order on the terms of his paying the amount claimed into Court to abide the result. He states the payment and the terms on which it is made in his defence—an unnecessary thing to do, but in these days of rambling statements not incredible—and he pays the

money in when he files his defence. With us the money is paid to the same officer who would receive it on an ordinary payment into Court. The defendant would have done, under an order, just what the present defendant, without an order, says he did. I do not see why in one case more than in the other the plaintiff should be allowed to receive the money without establishing his right to it, always provided that the defence really intimates to the plaintiff that it is paid in conditionally.

That is, I think, the plain reading of the paragraph in this case; wherefore, in my opinion, the plaintiff should restore the money if the decision against him on the merits is sustained.

Before leaving the subject of Order XXVI., I may suggest what may yet come up for decision, that apart from the payment of money into Court conditionally to abide the result, a proceeding for which I do not see any practical object, though I would not, by reasoning back from it, give it an effect that I do not believe was intended or expressed in the pleading, the liberty of pleading a defence while paying money into Court ought and perhaps may be found to enable a defendant who is willing to purchase peace by paying money, or to pay blackmail, as Sir G. Jessel called it in *Emden v. Carte*, 19 Ch. D. 311, 317, to pay the money in satisfaction, provided the plaintiff accepts it in satisfaction, without giving the plaintiff a right to take it out of Court in part satisfaction of his unadmitted demand, and to proceed merely for the residue.

The language of several of the learned Judges in the cases cited, and particularly of Sir Geo. Jessel, in the case just mentioned, seems to treat the payment as one which may be of this character; but in the decisions relied on as authority, the point is not directly dealt with, and when the right to pay is put upon the same footing as under the C. L. P. Act, it may be implied that what I now suggest was not thought of or recognized as an effect of the new system. The matter is now dealt with in England by the Supreme Court Rules of 1883, which have made more

specific provision for payment into Court, and by the Supreme Court Funds Rules, 1884, which provide forms to be used when money is paid in satisfaction, and when it is paid with a defence denying liability. Under these rules there will probably be no room for questions such as arose in the cases to which I have referred.

The only case I have noticed in which they were in question is the very late one, *Re Earl of Stamford, Savage v. Payne*, 33 W. R. 909. I shall not occupy time by discussing it, because it can scarcely be said to bear on the matter before us. If it has any such bearing, it is in the direction of supporting my view that the real intention, where it satisfactorily appears, as it did in that case by the defence filed, should prevail over the technical effect of a formal proceeding. That is, I think, the principle of the decision of Pearson, J., which was upheld in appeal.

I concur in the opinion that the defendant is not properly chargeable with the money lost by the failure of Messrs. Knight & Co., though his defence may not take exactly the shape in which he puts it in his pleading.

For the reasons given by Mr. Justice Ferguson in the Court below, and now more fully discussed by his Lordship the Chief Justice, I think the doctrines which govern the duties and liabilities of trustees, and the principle embodied in the second section of the Act respecting trustees and executors, R. S. O., ch. 107, are applicable to save the defendant.

Any doubt I have had on the subject has not been respecting the application of those principles to the defendant as trustee for the sale of the timber; but it has been whether the agreement of 29th July, 1881, did not place the matter on a new footing, so as to require us to determine the question of liability with reference only to the terms of that agreement.

I refer to the general provision that the defendant, when he sold the limits, was to pay over to the plaintiff that part of the purchase money which represented the inter-

est of the insolvents in the limits, deducting therefrom about \$58,000 for a debt due to himself; but that if the timber in the hands of A. F. A. Knight & Co. should be sold before the limits, then the defendant was to deduct the amount it realized from the \$58,000.

The limits were sold on 20th September, 1881. That day had been fixed for the sale before the date of the deed of 29th July, 1881, and the \$58,000 account was made up with interest computed prospectively up to the 20th September, 1881. Messrs. Knight & Co., had in fact sold the timber, and had shipped the last of it for England before the sale of the limits, but for want of returns the fact of the sale of the timber was not known to the defendant or to the plaintiff until after the limits had been sold, and the accounts of that sale closed.

When the settlement of 29th July, 1881, was made, I do not doubt that the net value of the lot of timber would have been deducted at once from the \$58,000, if it had been then ascertainable, notwithstanding that the money had not reached the defendant's hands, because, at that time, no one anticipated the failure of Messrs. Knight & Co.

It is, I think, consistent with what we are told of the character of that settlement, and with the belief of everyone in the solvency of Messrs. Knight & Co., to understand that, in using the phrase "the amount realized," what was in the minds of the parties was not the cash actually paid over to the defendant by the brokers, but the net amount produced by the sale, the amount which would at once have been taken into the account if it had been known, and which was to be so dealt with if ascertained before the 20th September, 1881, the date as of which the \$58,000 item had been computed. It would have made no difference to the estate represented by the plaintiff whether the money was deducted from the \$58,000 or paid over in cash; but, inasmuch as they were stipulating in July for payment to the defendant of a balance of \$58,000 that was computed as of the following September, it was prudent to make it clear that that balance was struck irre-

spective of this other item with which before 20th September the defendant might become chargeable. In my opinion that was the office of the clause added to the agreement, for deducting the amount realized from the stated balance in case the timber was sold before the limits, which was only another expression for before 20th September; and that the clause did not otherwise alter the relation or liability of the parties, wherefore the loss falls upon the estate, and not upon the defendant.

My conclusion is, that the plaintiff fails in his cross-appeal, and that we should allow the defendant's appeal, with costs.

OSLER, J. A.—I agree that the plaintiff's cross-appeal should be dismissed, as I think the learned Judge at the trial took the right view of the measure of the defendant's liability in the circumstances.

It is remarkable that the particular ground of defence on which he succeeded was not pleaded. That which is pleaded, namely, that the plaintiff agreed to look to Knight and to discharge the defendant, was not proved.

With regard to the defendant's appeal, we have to examine the pleadings in connection with the Judicature Act and rules, and to see whether the case is governed by the English authorities, which it is said preclude him from obtaining relief.

The plaintiff by his statement of claim sets forth five distinct clauses or causes of action, with the second of which only we are concerned.

That claim is in respect of the proceeds of a quantity of timber mentioned in one of the clauses of the agreement on which the firstly alleged claim is founded, which timber had been placed by the defendant in the hands of one Knight for sale. By the statement of defence different answers are pleaded to all the claims. As to the second, it is alleged that the defendant gave the plaintiff an order which he accepted upon Knight for the money due by him, that he received part of it from Knight, and agreed

to look to him alone for the whole of it, and discharged the liability for it.

The statement of defence then proceeds as to this claim as follows: 9. "*In case this honorable Court should be of opinion that the defendant is still liable for the payment of the balance of the money mentioned in the next preceding paragraph, the defendant now brings into Court ready to be given to the plaintiff the sum of \$4,300, and states that the same is sufficient to pay in full all claims of the plaintiff in respect of the balance of the moneys received by the said A. F. A. Knight, mentioned in the seventh paragraph of this statement of defence, and of all interest thereon, and of all damages for non-payment thereof, or for omission to credit the same on the defendant's claim, pursuant to the deed set out in the seventh paragraph of the plaintiff's statement of claim.*"

Under this statement of defence the \$4,300 was paid into Court. The amount appears to have been made up by calculating the interest up to the time of payment into Court. The plaintiff took it out after joining issue generally on the statement of defence. The action was taken down for trial, and the defendant having succeeded in disproving his liability as to all the causes of action, now asks that the money thus paid into Court and paid over to the plaintiff may be ordered to be repaid to him.

The four rules of our Order XXVI., O. J. Act, headed "Payment into Court in satisfaction," are the same as those of Order XXX. of the English Judicature Act.

Under these rules it was held in *Berdan v. Greenwood*, 3 Ex. D. 251, C. A., that a defendant might pay money into Court in respect of a cause of action, the existence of which he at the same time denied.

Thesiger, L. J., delivering the judgment of Brett, L. J., and himself, says (p. 255): "It is suggested that money is not paid into Court by way of satisfaction or amends, within the meaning of Rule 1 of Order XXX. (corresponding to Rule 216, O. J. Act,) when it is paid into Court in respect of a claim or cause of action, which the defendant does not admit to exist in fact. Such an argument does not, however, appear to us well founded. The sum paid in is * * absolutely appropriated to the purpose of satisfaction or

amends. The plaintiff may obtain payment of it out to himself in manner provided by the third rule of the Order under consideration, and may, either under Rule 4, accept it in satisfaction of the causes of action in respect of which it is paid in, and if he accept it in satisfaction of the entire cause of action, may tax his costs and sign judgment for the costs so taxed; or, if he think proper, may go on with the action for the purpose of recovering something more, in which event the issue, quoad the defence of payment into Court, will be the same as it was before the coming into operation of the Judicature Acts, although there will be other issues going to the same cause of action which the tribunal by which the action is tried will have to determine."

In *Goutard v. Carr*, 13 Q. B. D. 598 (n), *Berdan v. Greenwood*, was followed and approved. I quote from the judgment of Brett, M. R., as it deals very fully with the subject. He says, at p. 599: "What * * is the legal effect of a payment of money into Court when accompanied with a pleading containing expressions such as those used by the defendant in this case? I maintain the opinion entertained by Thesiger, L. J., and myself in *Berdan v. Greenwood*. * * It seems to me that money could not have been paid into Court in the present action except by virtue of Order XXX., Rule 1, of the Rules of Court of 1875. The form of the pleading which was pleaded may be wrong, but the question here is, what is the effect of such a payment, and that must depend on the meaning of Order XXX., Rule 1, under which the money was paid into Court: * * If the money was paid in under Order XXX., Rule 1, as it must have been, it was a defence in satisfaction of the cause of action in respect of which it was paid, that is in this case of the whole cause of action.

* * Williams, J., seems to have thought that in consequence of the expressions used in the pleading, the money was not paid into Court in satisfaction, and that the plaintiffs would not have been able to take it out of Court, but I am unable to agree with him in this respect. The money could not have been paid into Court and the officer would have had no authority to receive it, and such payment would have had no effect whatever, except it was paid in under Order XXX., Rule 1, and it cannot, I think, be denied that when paid into Court under that rule it was a payment in satisfaction of the cause of action to which it was pleaded, and by Rules 3 and 4 it would be paid out to the plaintiffs."

Bowen, L. J., says (601): "I do not deny that there may be many ways of drawing the pleadings, and that some of the ways may be bad, but I do not think it possible to have paid money into Court in this action, except under Order XXX., Rule 1, and I concur in the view of the present M. R., and Thesiger, L. J., of the effect of such payment as expressed in their judgment * * * in *Berdan v. Greenwood*, and I may add that in *Hawkesley v. Bradshaw*, Lord Bramwell took the same view of the law."

The last case from which I shall quote is *Wheeler v. The United Telephone Co.*, 13 Q. B. D. 597, 613, where *Goutard v. Carr* is followed and approved, Brett, M. R., saying: "In that case I expressed an opinion that where payment into Court is allowed to be pleaded as an alternative defence, it is a defence to the action, in the sense that if it succeeds, the action is defeated. Whatever the exact form of the defence may be in words, the substance of it is, that the money is paid into Court, and the defence is pleaded as an alternative defence, which means that if the defendant fails in the other defences which he has set up, this is his defence to the action."

Bowen, L. J.: "When such a defence as this is pleaded, and money is paid into Court, it was decided (in *Goutard v. Carr*) that such payment should be treated as a payment into Court, according to what was prescribed by Order XXX. of the Rules of 1875. If this were not so the defence would be incomprehensible, for why should anyone pay money into Court where he can gain nothing by it? But when the defendant has the benefit of what is treated as an alternative defence there is some reason for paying into Court. The result of the decision in *Goutard v. Carr*, is, that variations in the form of expression in the defence, do not destroy the effect of the fact of bringing the money into Court."

Fry, L. J., says: "Mr. Fillan has argued upon the mere construction of the defence, but the admission by payment into Court is more potent than the denial of liability."

I have quoted very fully from the opinions delivered in the foregoing cases, because it was forcibly pressed upon us that the language of the pleading in the principal case clearly indicates that the money was paid in conditionally only on the claim being established, and these authorities

determine on principle that such a construction of the rules is not admissible.

Different expressions are to be found in the cases, such as "without admitting any liability:" *Wheeler v. The United Telephone Co.* "Lest contrary to what the defendant believes and contends:" *Berdan v. Greenwood*; *Coughlan v. Morris*, 6 L. R. Ir. 29, 405. "If by reason of any wrongful act the plaintiff has sustained damage;" *Goutard v. Carr*; but the prevailing fact is that money is paid into Court under the pleading, and that the defendant is enabled to avail himself of it as a defence in the action.

The decision in the Irish case of *Coughlan v. Morris*, *supra*, in which the defendant sought to compel the plaintiff to return into Court money taken out by him, which had been paid in under the statement of defence, only follows and enforces under different circumstances the construction placed on the rules by the English Court.

The present action, being an action to recover an equitable debt, is one in which money might be paid into Court under the rule.

I am unable to see any substantial distinction between the expression here used, "In case the Court should be of opinion that the defendant is still liable," and those found in the pleadings in the cases cited.

Why should the money have been paid in except to gain some advantage by doing so?

We cannot fail to observe that no application was made before the trial to compel the money to be replaced in Court, and that the only meritorious defence pleaded was wholly unsustainable by the evidence.

Even if the defendant had not succeeded in defeating (by a defence which he did not plead,) this particular claim, would he not have been entitled to the whole costs of the action, having succeeded as to all the other causes of action by disproving them, and as to this one, by reason of having paid into Court the amount claimed as an alternative defence? It would have been difficult for the

plaintiff, in the face of the authorities I have mentioned, to contend that it was not well pleaded as such, and therefore, that the defendant had not entitled himself to costs.

And we may be certain that in such an event, that is the event of the plaintiff having proved his claim, the defendant would have been found asserting that it had been so pleaded, since the whole virtue of such a defence is that the money is paid in, not conditionally, but absolutely in satisfaction.

He cannot run with the hare and hunt with the hounds.

As the M. R. and the L.JJ. point out, there is no authority to pay money into Court or for an officer to receive it with a statement of defence, except under the rule, and when so paid in, it is as a defence—an alternative defence if accompanied by a denial of liability to the action.

It cannot be paid in as a conditional defence. Whatever may be thought of the force of the reasoning of Williams, J., in his judgment in *Wheeler's Case*, to that effect, it seems to me to be met by the arguments in the Court of Appeal, whose construction of the rules and repeated decisions thereon we are bound to follow in any case which comes fairly within them.

I do not see that anything turns upon the officer's memorandum on the requisition to the bank to receive the money. It had no effect on the pleading or the payment into or out of Court. It was a mere formality and misled no one, and does not appear to have been objected to by the solicitors' agents who prepared the requisition (which we have examined.) We are not informed that they received any instructions except to pay it in under the plea in the usual way, which could only be done under the rule marked by the officer in the margin of the requisition.

I refer to the case of *Savage v. Payne, Re Earl of Stamford*, 33 W. R. 909, decided since the foregoing opinion was written, merely to shew that it has not been overlooked. The question there arose upon the new English

Rules of the Supreme Court, 1883, and the Supreme Court Funds Rules, 1883, which specially provide for the case of a payment into Court with a defence denying the liability. The decision has no bearing on the case before us.

The Court being equally divided, both appeals were dismissed, with costs.

Both appeals dismissed.

[This case has since been carried to the Supreme Court.]

HENDRIE V. NEELON.

Contract for sale of timber—Non-delivery—Loss of profits—Measure of damages.

M. contracted to deliver timber of a certain kind to the defendant at St. Ignace, which to the knowledge of M. was intended to be transported by the defendant to Quebec for sale there. Part only of the timber was delivered, and in an action by M.'s assignee for the price thereof, the defendant counter-claimed for damages for non-delivery of the residue. There was no market for such timber at St. Ignace or at any place nearer than Quebec.

Held, [affirming the decision of the Queen's Bench Division, 3 O. R. 603,] that the market value of the timber at Quebec, less the cost of transportation, was the true measure of damages.

An appeal by the plaintiff from the judgment of the Queen's Bench Division (3 O. R. 603) reversing the judgment of Burton, J.A., at the trial, whereby the defendant was held entitled only to nominal damages upon his counter-claim, and directing judgment to be entered for the defendant thereon for \$839.61, to be set off against the amount recovered by plaintiff on his claim in the action.

The action arose out of a contract for the delivery of timber by one Macdonald (who assigned the contract to the plaintiff), to the defendant at St. Ignace, to be transported by the defendant to Quebec for sale there. Part of the timber contracted for was delivered and this action was brought for the price, but Macdonald having failed to deliver the residue, the defendant counter-claimed for damages for the non-delivery.

The appeal was heard on the 10th day of June, 1885.*

E. Martin, Q.C., for the appellant. The contract was for the delivery of a specific article, to be made by Macdonald near St. Ignace, at the stern of the vessel in St. Ignace. Macdonald's duty and liability ceased at that point, and the question of damages for non-delivery must be fixed at that point, just as it would if the respondent had refused to accept the timber at St. Ignace. The

**Present.*—PATTERSON, OSLER, J.J.A., GALT and ROSE, JJ.

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respondent is entitled to no more damages against Macdonald, than he would have been against insurers if the timber had been burned at St. Ignace as soon as placed on the ship. Even if the respondent is entitled to substantial damages, there is no evidence to warrant their assessment at so large a sum as \$839.61. The respondent is not entitled to speculative damages.

McCarthy, Q. C., for the respondent. There was no market at which timber such as that in question could be purchased at St. Ignace, or at any place nearer to it than Quebec, and therefore the market price at Quebec, less the cost of transportation thither, is the true measure of damages; and the loss of the difference between the contract price and the Quebec market price, less the cost of transportation, was, in the contemplation of both parties at the time of the contract, the damage which would result from failure to deliver the timber.

The authorities are referred to in the report of the case in the Court below, and in the judgment of Osler, J.A.

September 15th, 1885. OSLER, J. A.—The plaintiff in this action seeks to recover, as assignee of one Macdonald, the balance of the price of certain timber sold and delivered by Macdonald under a contract between them. The amount of such balance is not disputed, but the defendant insists upon the right to set it off, or to retain it, in whole or in part, in satisfaction of a claim for damages sustained by him by the breach on Macdonald's part of the contract referred to.

It was found as a fact, and is not contested, that there was a breach of contract by Macdonald in failing to deliver between 9,000 and 10,000 feet of the timber contracted for, but the learned Judge at the trial held that there was no satisfactory proof that the defendant had sustained in consequence more than nominal damages. A majority of the Queen's Bench Division took a different view of the evidence, and directed judgment to be entered in the action

for the defendant, being of opinion that he had sustained damage to an amount at least equal to the plaintiff's claim.

The only question to be determined on this appeal is, whether, on the evidence, we can say that the Divisional Court were wrong in holding that the defendant was entitled to substantial damages. If not, we cannot, I think, interfere as regards the amount.

The material facts, as I gather them from the evidence and as they were understood and acted upon by the Court below, are these: The timber was to be manufactured by Macdonald and delivered by him at Port St. Ignace, on Lake Michigan, whence it was to be transported by the defendant by vessels and in rafts to Quebec. There was no market for such timber at or in the neighborhood of the place of delivery, as it was manufactured and got out under special contract, and only at certain seasons of the year, for the purpose of being taken to Quebec, which was the nearest market-place where it could be otherwise procured, and where it was sold for the English and other foreign markets.

The business of getting out timber in this way for the Quebec market was a well-known one, and there is no reason to doubt, and I think the inference has been properly drawn from the evidence, and from what took place at the trial, that Macdonald knew that the timber in question was being got out for, and was intended to be taken to, that market.

The time for the completion of his contract was extended for another season, but he again made default, and the evidence is, that it was then impracticable for the defendant to have made good or procured the deficiency, at or in the neighbourhood of Port St. Ignace or Sheboygan.

The ordinary market price of such timber at Quebec at the time the contract was made, and from thence up to and at the time of its final breach, was shewn to be 40c. per foot, and the contract price for rafting and getting it out at Port St. Ignace had not varied, the result being that the Quebec market price represented an ordinary profit,

after payment of all expenses of transport, &c., of about 10c. per foot.

The Court allowed damages at the rate of 9c. per foot, and this has been strenuously objected to, as being an allowance of profits of a speculative, contingent, and uncertain nature, which do not constitute a legitimate ground of damage.

The case is one of that class in which, there being no market at the place of delivery for the articles contracted to be delivered, the ordinary rule does not apply, and some other mode must be resorted to in order to ascertain the measure of damages to which the purchaser is entitled, keeping in view the general rules which apply in all cases, and which are thus stated by Selden, J., in *Griffin v. Colver*, 16 N. Y. App. 489, 494:

“The broad, general rule in such cases is, that the party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed.”

The damage sought to be recovered in the case at bar is not in the nature of special damage for the loss of profits derivable under a sub-contract, though where there is no market, such a sub-contract may be proved in order to shew the real value of the goods, nor is it in strictness damage for the loss of market. It is in principle of the same nature as that which is sustained and is recoverable where there is a market, and the market value of the goods has increased at the time of the breach.

The observations of Mr. Justice Cooley in *Allis v. McLean*, 48 Mich. 428, 431, 432, on this subject are worth quoting. The action was for breach of contract to furnish machinery for a saw mill:

“The difficulty in measuring damages by profits is that they are commonly uncertain and speculative, and depend

upon so many contingencies that their loss cannot be traced with reasonable certainty to the breach of the contract. When that is the case they are said to be too remote; and the damages must be estimated on a consideration of such elements of injury as are more certainly and directly the result of the failure in performance. But in some cases profits are the best possible measure of damage, for the very reason that the loss is indisputable, and the amount can be estimated with almost absolute certainty. The case of a contract for the delivery of grain or any other article which at all times finds a ready sale at a current market price is an instance; if the contract is not performed, the purchaser may recover the advance beyond the purchase price; and this, though not recovered under the name of profits, is really nothing else."

Upon the best consideration I have been able to give to it, I am of opinion that the decision appealed from is quite within the principles deducible from the authorities relied upon in the Court below, and others to which I shall briefly refer.

Hinde v. Liddell, L. R. 10 Q. B. 265, was an action for breach of contract to supply a quantity of grey shirtings for shipment abroad. The defendant being unable to complete his contract by the time specified, and there being no market in England where similar goods could be obtained, the plaintiff at an increased price procured other shirtings as nearly as possible equal in price and quality to those contracted for. He was held entitled to recover the difference between the contract price and what he had to pay.

Blackburn, J., says (p. 267): "But there was no market for this particular description of shirtings, and therefore no market price; in such a case the measure of damages is the value of the thing at the time of the breach of contract, and that must be the price of the best substitute procurable." And again (p. 269): "When the thing cannot be got in the market, * * if you cannot have the market price, still the plaintiff is entitled to more than nominal damages."

He then refers to *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473, in which it is said in the judgment of the Court (p. 476):

"It is, no doubt, quite settled that, on a contract to supply goods of a particular sort, which at the time of the breach can be obtained in the market, the measure of the damages is the difference between the contract price and the market price at the time of the breach. Where, from the nature of the article, there is no market in which it can be obtained, this rule is not applicable; but it would be very unjust if, in such cases, the damages must be nominal; and there are several decisions shewing that such is not law."

One of these is the early case of *Bridge v. Wain*, 1 Starkie 504, which was an action for breach of contract for delivering goods for sale in China, which were not of the quality and kind contracted for. There was no evidence of the sum actually produced by the sale. It was contended that the plaintiff could not recover more than the difference in value between the article delivered and that contracted for, without reference to any special and particular loss resulting from the loss of the sale in China, Lord Ellenborough said (p. 506,) "I am decidedly of opinion that by value, is to be understood, the value which the plaintiff would have received had the defendant faithfully performed his contract."

The only difference between that case and the case before us would seem to be that in the former the goods were deliverable by the vendor at the market they were intended for, whereas, in the latter, they were deliverable at an intermediate point, whence the vendee was to transport them to the market.

O'Hanlan v. Great Western R. W. Co., 6 B. & S. 484, is a case similar in some respects to *Bridge v. Wain*, *supra*, though the goods were not for shipment abroad. Blackburn, J., says: "Where there is no market, from the nature of the thing no evidence of what the importer's profit is can well be given, and the jury must say what is the fair and reasonable profit which persons in the ordinary course of business would be likely to make."

Elbinger v. Armstrong, L. R. 9 Q. B. 473, was approved of in the recent case of *Grébert-Borignis v. Nugent*, 15 Q. B. D. (C. A.) 85. There it was held, there being no market

for the goods of the description contracted for, that the plaintiff was not only entitled to recover as damages the amount of profit he would have made had he been able to fulfil his sub-contract, but also (the defendant having had notice of the sub-contract at the time he entered into his own), damages in respect of the plaintiff's liability upon the sub-contract.

Brett, M. R., says (p. 89) that the result of the cases is this :

“ Where a plaintiff * * is seeking to recover for some liability which he has incurred under a contract made by him with a third person, he must shew that the defendant, at the time he made his contract with the plaintiff, knew of that contract. If such sub-contract was not made known to him at all, the defendant cannot be made liable for what the plaintiff has had to pay under it. If there be no market for the goods, then the sub-contract by the plaintiff, although not brought to the knowledge of the defendant, the original vendor, may be put in evidence in order to shew what was the real value of the goods, and so enable the plaintiff to recover the difference between the contract price and the real value.”

In *Stevens v. Lyford*, 7 N. H. 360, a case not unlike the present, the plaintiff claimed damages for a breach of contract by the defendant to deliver a certain description of lumber at Franklin, N. H. whence it was intended to be transported by the plaintiff to Charlestown or Boston. The jury were directed that if they believed lumber of that description could not be obtained by the plaintiff at Franklin, they might consider what was the price of such lumber at Charlestown and the expense of rafting the same from Franklin, and in that way ascertain the plaintiff's damage. This direction was upheld. The Court say: “ The plaintiff is entitled to recover according to the value of the timber to him, at the place of delivery. He is entitled to be remunerated for the loss sustained by the non-fulfilment of the contract. For the purpose of shewing this loss he is not confined to any particular species of evidence to prove the value of the lumber at the place of delivery. He may shew it by shewing a market price there, if there have been sales enough to establish a market price; or he

may shew its value at the market where such lumber was usually sent, and the cost of transportation from the place of delivery, and this will be a guide to measure its value at the place of delivery. The difference between the value of the lumber at the place of delivery, and the price to be paid, is a damage which may be presumed necessarily to result from a breach of the contract * * If this evidence had been admitted to shew the profits which the plaintiff might have obtained, it was not evidence to shew any special profits which he might have made by reason of any particular contract, but only the profits which would have accrued by the general course of trade, and thus to shew the value of the lumber at the place of delivery."

The element in our case, which does not exist in any of the cases cited, except the last, is that which I have already adverted to, namely, that the article was to be transported by the purchaser from the place of delivery to the place of market. It seems to be conceded that if the defendant had himself actually contracted to re-sell the timber, he might have purchased it in Quebec and charged the vendor with the amount paid, less the contract price and the cost of transportation.

That would be the case even if the timber had not been intended for the Quebec market, if that was the nearest place where it could be procured against the vendor's broken contract, and if it was a reasonable course under all circumstances to have taken. Here there is the additional fact that it was known to the vendor that the timber was intended for such market; and its market value there, after making similar deductions, may, I think, be taken as the proper measure of the damages resulting from the breach of the contract; the natural and probable consequence of such breach—the consequence which, from the facts then known to them, may fairly be considered to have been within the contemplation of the parties when they made their contract—being, that the purchaser in the event of its non-fulfilment would be deprived of the opportunity of disposing of the timber in the market it was intended for. I do not think that such damages can fairly

be described as too remote or uncertain, or as being merely contingent or conjectural, nor can I see any just reason why they should not be ascertained on this basis as well when the purchaser has not bought against the broken contract as when he has done so, the market value of the goods at the place where they were intended to be sold, after a deduction for the cost of transportation, forming as good a criterion of the limits of the purchaser's damage as the price obtained on a sub-sale. I think it is evidence on which the jury or a Judge may safely act in assessing such damage, though, of course, I do not mean to say they are bound to do so to the full extent.

In addition to the cases already cited, I refer to the following: *Masterton v. Mayor of Brooklyn*, 7 Hill N. Y. 61; *Furlong v. Polleys*, 30 Me. 491; *Sternfels v. Clark*, 2 Hun. N. Y. 122; *Heineman v. Heard*, *Ib.* 324, 332; *Cumden Co. v. Schlens*, 59 Md. 31, 45; *United States v. Behan*, 4 Sup. C. Reports (Vol. 108 U. S. Reports) 81, 83; *James v. Adams*, 8 W. Virginia 568; *Hamilton v. Magill*, 12 L. R. Ir. 186; *Hawes v. South Eastern R. W. Co.*, 52 L. T. N. S. 514; *Simpson v. London and North Western R. W. Co.*, 1 Q. B. D. 274.

I think the appeal should be dismissed.

PATTERSON, J. A., GALT and ROSE, JJ., concurred.

Appeal dismissed, with costs.

BEATTY ET AL. V. NEELON ET AL.

Misrepresentation in formation of company—Action of deceit—Evidence—Delay—Measure of damages—Parties.

The plaintiffs, formerly owners of a line of steamers, filed the bill in this cause against the defendants, who were formerly owners of another line of steamers, seeking damages in respect of alleged misrepresentations on the part of the defendants as to certain contracts alleged by them to be held in connection with their line, and whereby the plaintiffs alleged they were induced to enter into an agreement with the defendants for the amalgamation of the two lines, and the formation in connection with the defendants of a joint stock company to own and run the same. The agreement was made in December, 1876, the charter of the company was obtained in March, 1877, and the plaintiffs became aware of the alleged misrepresentations in May, 1877; notwithstanding which they continued to carry on the business, allotted shares, and allowed dividends to be paid until and after the bill was filed, which was not till February, 1881. The cause was not brought to a hearing till May, 1884, and one of the defendants died while it was pending. The evidence as to the alleged misrepresentations was conflicting.

Held, that this was in effect a common law action of deceit, and the misrepresentations alleged required proof of the clearest kind; and, therefore, that the long delay, the conduct of the plaintiffs, and their dealings with the subject matter disentitled them to relief upon the evidence submitted.

Seemle, if the plaintiffs had succeeded, the measure of damages would have been a portion of the profits of the contracts, as represented by the defendants, proportioned to the plaintiffs' shares of the capital stock of the company.

Per HAGARTY, C.J.O.—The action was wrong in its framework; it should have been brought in the name of the company, or on behalf of all its shareholders.

Per BURTON, J.A.—The action could not have been maintained by the company upon representations made to the plaintiffs.

THIS was an appeal by the defendants from the judgment pronounced at the trial by Wilson, C. J., sitting for a Judge of the Chancery Division (9 O. R. 385.)

The bill of complaint, filed on the 21st of February, 1881, alleged misrepresentations by the defendants as to certain contracts held by the latter, whereby the plaintiffs were induced to enter into an agreement for the amalgamation of the two lines of steamers owned by plaintiffs and defendants respectively, and for the formation of a joint stock company, and claiming damages in respect of such misrepresentations.

The cause was heard on the 13th of May, 1884, and judgment was delivered on the 1st of September following.

The finding of Wilson, C. J., as to the damages was as follows :

“I find that the defendants did deceive and misrepresent the two matters referred to in manner and form as charged against them by the plaintiffs, and that they should account for three years’ postal charge at the rate of \$100 per week

And for twenty-five weeks in each

year.....\$7500 00

And for the share of the Windsor

bonus, amounting to 2000 00

\$9500 00

As I find the defendants did get the benefit of these two sums on the final agreement of December, 1876, they are bound to account for them to the plaintiffs, and I direct they shall do so.”

The other facts are fully stated in the report of the case in the Court below.

The appeal was heard on the 15th of September, 1885.*

Robinson, Q. C., W. Cassels, Q. C., and R. Gregory Cox, for the appellants.

McCarthy, Q. C., and J. H. Macdonald, for the respondents.

October 13th, 1885. HAGARTY, C. J. O. —The judgment appealed from directs the payment by the defendants Neelon and Campbell to the plaintiffs of \$9,500, as a personal claim. This amount is made up of two items.

Three years’ postal subsidy on the contract with the Government to carry the mails from Windsor, at

\$100 per trip \$7500

Share of the Windsor bonus for one year 2000

\$9,500

The agreement between the three plaintiffs and the defendants and Graham (since deceased) was made 29th December, 1876.

**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, J. J. A.

The plaintiffs owned several steamboats. So did the defendants. It was agreed to form a joint stock company, and that the vessels of the contracting parties and all contracts and connections, &c., should be transferred to the projected company.

The company was formed and incorporated 5th March, 1877, and the respective vessels duly transferred to such company.

In valuing the respective properties the parties took into account certain alleged contracts and connections, and it was arranged that the capital stock should be \$250,000 in 500 shares of \$500 each.

Jas. H. Beatty to have.....	211 shares.
Henry Beatty ".....	126 "
John D. Beatty ".....	43 "
	<hr/>
	380
Neelon to have.....	60 shares.
Graham ".....	30 "
Campbell ".....	30 "
	<hr/>
	500 shares.

Thus we have the plaintiffs with	\$190,000, and the
defendants with	<u>\$60,000</u>
	\$250,000

The present claim is based on an alleged misrepresentation, made by the defendants, that they had a contract with the government to carry the mails for four years, commencing with the season of 1876; and also that they were entitled to one year of a three years' "bonus" of \$6,000 given to the defendants by the town of Windsor; and that on the faith and basis of these representations the number of shares allotted to the defendants in the company was based.

The decree orders payment of these two sums by the defendants to the plaintiffs.

Before the obtaining of the charter the parties agreed to increase the whole amount of the stock to \$300,000, distributed on the original basis of agreement.

The charter was obtained 5th March, 1877. The plaintiff, Jas. H. Beatty, alleges that some time in May he discovered the misrepresentation as to the Windsor contract and bonus, and brought it before the board meeting of the company in the next month, June.

In March, 1880, the plaintiff, James H. Beatty, had an account made out against the defendants, charging them in account with the North West Transportation Company with these items and interest thereon.

The business of the company was carried on in the seasons of 1877, 1878, 1879, 1880, and, in fact, is still in progress.

February 21, 1881, this suit was commenced.

If the company had been formed, as is alleged, on the strength of these misrepresentations, and the defendants' interest therein obtained on this false basis, the present plaintiffs—aware of the true state of the case almost immediately after the incorporation—could have adopted the natural course open to persons deceived into a fraudulent contract, of asking for a dissolution, and reconveyance of the properties conveyed to the joint adventure.

They did not take any such course, but conducted the business for four seasons in the ordinary course. They now seek to support a decree giving them the two items of \$7,500 and \$2,000 to be paid to them personally.

It is to be observed that the prayer of the bill is, that the defendants be ordered "to pay such damage as the plaintiffs have sustained by reason of the representation of defendants, and by reason of the refusal of defendants to account in respect of the \$2,000," and for other relief.

The decree seems to proceed on a different principle from that urged in the bill as a ground of relief. The principal plaintiff, in his evidence, expressly states that the result of the defendant's misrepresentations was that they obtained thereby a larger amount of stock than if the truth had been known; that the amount allotted to the plaintiffs was not thereby lessened, but the amount allotted to the defendants thereby increased.

So that it seems clear that the whole result of the injury complained of was that the defendants thereby obtained a larger number of transferable shares, and a larger amount of dividends to the holders thereof, thereby diminishing *pro tanto* the dividends and profits of the other shareholders.

Some very serious questions present themselves.

The decree treats it as a personal injury to the plaintiffs, and damage resulting therefrom to the whole extent of the items.

It was undoubtedly an injury to the joint adventure that a sum of, say \$10,000, which ought to have been paid to it, was not received to form part of the assets, and also that a certain amount of transferable shares had been allotted to certain parties based on the expected receipt of this sum.

It seems to me that the injury and consequent damage was resulting to all the shareholders, to be ascertained, as far as practicable, in proportion to their respective interests.

Granted that an action for deceit lay at the suit of the individual claiming to be thereby damnified, the inquiry must, of course, be pursued as to how and to what extent the damage claimed accrued.

The damage here claimed is not for inducing or causing the plaintiffs to enter into a partnership or company, into which they would not otherwise have entered. It is only for the damage sustained by them in the company, from the defendants' misrepresentations.

If the agreement herein set out had specified these two alleged contracts, and the defendants specifically agreed to bring them in as their contribution, their failure so to do would have been followed by a suit to compel them so to do, or to pay the value thereof on proof of their inability.

But the contracts would have gone to the company—so I apprehend would the value thereof, assessed as damages.

Neither the contracts, nor the value would pass to the plaintiffs personally.

As the case strikes me, I repeat my strong opinion that the injury is to the holders of the shares, whose dividends are so far reduced, and whose interest in the assets and property of the company is lessened by the absence of this \$9,000 or \$10,000, which otherwise would have been realized as available assets.

Within two or three months of the incorporation, the defendant, S. Campbell, sold all his shares in the company.

After this suit commenced the plaintiff James H. Beatty purchased for his own purposes (about February, 1883) the whole of defendant Neelon's then stock, 101 shares, and he admits that though this suit was pending, nothing was said about it between him and Neelon.

Neelon originally had 103 shares.

James H. Beatty says he believes Neelon had previously sold some to James H. Beatty's brother, apparently one of the plaintiffs, and some to Henry Beatty, one of the plaintiffs.

This, to say the least of it, was a very curious dealing to take place pending this suit, which impeached the right of Neelon to have obtained so large an interest in the company by false representation. This occurred more than a year before the hearing of this case.

If the plaintiffs' arguments be sound, there was a complete right of action to recover for plaintiffs' personal benefit this \$9,500 vested in them at once. The result would be that the plaintiffs could recover it and hold it, although before bringing the suit, or even before ever acting under the charter in the business, they had sold all these shares in the company at a premium, and in like manner had they so sold the shares purchased at a discount from Neelon.

All these considerations lead me to the belief that the alleged injury and consequent damage, was done to the company, and it is the company and not these plaintiffs personally who should sue for and recover the same.

The plaintiffs' bill in no way professes to be filed on behalf of or for the benefit of the company, nor on behalf of themselves and all other shareholders.

The bill alleges [par. 16] that "the company have wholly lost the sum of \$100 per trip, whereby also the plaintiffs have suffered loss as such shareholders by means of such misrepresentation."

Again [par. 21]. The defendants have "received \$6,000 from the town of Windsor under said contract and refuse to account therefor and refuse to transfer to said company the said contract, or the benefit of any portion thereof, &c., and whereby the plaintiffs have suffered loss."

The pleader must, I think, have felt the difficulty in making these statements to meet the actual facts, on a bill thus framed.

He says in these instances, "the plaintiffs have suffered loss as shareholders," again generally "the plaintiffs have suffered loss." So they have, but this loss is common to all the other shareholders, and it certainly seems that for property as here alleged to be withheld from and not transferred to the company, it would be the company as such that should call for relief, or at the least, if the company could not or would not sue as such, the claim ought to be on behalf of all the shareholders.

There is a very important judgment of Lord Hatherley (then Sir W. Page Wood) in *Beck v. Kantorowicz*, 3 Kay & J. 230, shewing the right of a company to claim in certain cases.

The head note is :

"Four out of five persons, who entered into a provisional contract to purchase a mine, which they agreed to sell for their joint benefit to a company, were deceived by the fifth, who, assuring them that the vendors would not take less than £85,714, obtained secretly from the latter an agreement, that, if the contract were perfected, and money paid, he should receive thereout a bonus of £20,000 for his pains in effecting the sale. Two of the four, having absolute powers from the rest to sell to the intended company, then formed themselves with others into a committee of management, and, still ignorant of the surreptitious agreement, issued a prospectus, stating, that a contract had been entered into for the purchase by the company of the entire property for £125,000, 'including all preliminary expenses, and a premium to the parties who incurred the risk and responsibility of the original purchase.' The company having been established, the requisite capital paid up, and the provisional contract perfected:

Held, that the £20,000 transaction was fraudulent, and void, not only as against the four original purchasers, but also as against the company,

notwithstanding the mine proved cheap at the price (£125,000), at which they became shareholders. It was not enough that the company got the whole of their bargain. They had a right to the best bargain which the two members of the committee of management, had they known the facts, would have been in a position, acting fairly and rightly, to give them."

There, as here, the original bargain between the parties was for the formation of a company, to whom the property was to be transferred, and transferable shares created as the capital stock.

At p. 244, the Vice Chancellor discusses the rights of the company.

The committee of management of the company filed the bill on behalf of themselves and all others the shareholders, &c.

A large number of shares, in normal value about £20,000, were appropriated to the defendant Kantorowicz, and scrip certificates therefor were in the hands of a defendant to whom Kantorowicz had assigned.

The bill sought to have it declared that the appropriation of these shares to K. was a fraud upon the company, and that he must make them good, and the Vice-Chancellor, after remarking that the case was most peculiar, held that neither Kantorowicz nor his assignee could hold these shares, that it was not only a fraud on his co-purchasers of the mine, but also a fraud against the company, and was fraudulent and void against the plaintiffs and such other shareholders, &c.

I am of opinion that a like principle must govern this case.

The gravamen of the case in appeal is, that the defendants obtained a position amongst the shareholders of the company, by representing that they had certain property of a named value to bring into the adventure, and that they had it not to bring in.

I cannot distinguish this, and the consequent injury to the company, from the case of having fraudulently induced the company to pay a larger sum for property than they lawfully should have paid.

In either case, it seems to me, that the injury must necessarily be to the shareholders, as such, and the company necessarily represents them, or, as stated before, if the company cannot lawfully or wrongfully refuse to sue, the claim must be on behalf of all the shareholders as a class.

Even if the case were wholly free from legal objections, I would feel great difficulty in arriving at the conclusion as to the facts which my learned Brother has adopted.

The suit was brought after, to my mind, great and wholly unexplained delay, after the company had been four years in full operation, and with full knowledge on the plaintiff's part of the alleged misrepresentations almost from the beginning.

I think it was a case, under all the extraordinary circumstances, which a court of justice should have required to be proved with undoubted clearness.

The evidence is most contradictory; the defendants most distinctly denying that the representations sworn to by the plaintiffs were ever made. There are material discrepancies on some points on both sides. The case does not strike me as one in which any serious importance is to be attached to the demeanour or appearance of the witnesses. They were giving evidence of transactions and conversations that had taken place seven or eight years ago, and it would have been strange if their recollections could have been uniformly clear.

We must look at the conduct of the parties. If the plaintiffs' statements be true, they could have obtained prompt redress by rescission of their contract. They elected to go on with their business, allot the shares, and let the defendants deal with those shares as their own in undisputed right. They allow large dividends to be paid from year to year to the defendants, or to whomsoever held their stock; and at last, after four years' business, bring this action in 1881, and do not carry it to a hearing till May, 1884. It is very doubtful, on the evidence, whether, if the Windsor contract had been binding, its performance would not

have entailed a positive loss, instead of a profit, on the company.

As to the defendant Neelon, my strong impression from the evidence is that no case of deceit or fraud was made out against him. He referred to the defendant Campbell when the terms of the contract were asked.

It has of course to be conceded that so far as the recovery of money or property is concerned, he would be equally liable with Campbell to refund anything, or forego any advantage obtained by his acceding to, or having adopted, Campbell's representations. It may also be conceded that merely omitting to press a legal claim for any period inside the statutable limitation is not in general a bar.

In the present case, it appears that the plaintiff James H. Beatty complained at the first board meeting and several times afterwards, and efforts were made several times to induce the government to make a contract to carry from Windsor. But I do not conclude from the evidence, that the defendants had for several years any substantial reason to think that legal proceedings would be taken against them.

The learned Chief Justice said that he decided "with some degree of doubt" in favor of the plaintiffs as to the Windsor bonus. I very fully share his doubt, and add to it, that in an action like this there ought to be no recovery unless the claims be beyond reasonable doubt.

I am unable to draw the inference favorable to the plaintiffs drawn by my learned brother from the letters.

The first letter of May 12th, 1877, written by James H. Beatty quoted in the judgment, does not, I think, much help the plaintiffs' case. Neelon's reply of May 14th merely states that he thought it better to leave the Windsor arrangement "to rest as it was until the House should meet again." All parties then understood that application was to be made to the Government, with a view to the consolidation of the mail service.

On May 21st, 1877, James H. Beatty writes the letter to Neelon, clearly referring to a letter lately received

from Neelon, which has not been produced. In it occurs the expression as to giving up three years of the Windsor four year contract on account of political necessity. To make this letter intelligible we should understand to what statements of Neelon's it was an answer.

The whole evidence as to what took place at the signature of the original agreement, and also the evening before, is, to my mind, extremely unsatisfactory, leaving a strong doubt in the mind as to the actual facts.

One of the defendants, Graham, has died sometime during the three years that elapsed between bringing the suit and the hearing. His testimony is thus lost.

This suit, instituted in the Chancery Division, is in the nature of a common law action for deceit—it can only be legally barred by the statutory limitations, and we may not be able to apply to it the doctrines as to laches and delay which govern Courts of Equity. The subject is fully discussed in *Kerr* ch. 6 sec. 4, p. 337.

In *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 1279, Lord Blackburn, after quoting the rule as to laches in *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 221, adds: "I think * * * it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favor of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry."

But if we treat this case exclusively as an action at law, we still know what an important feature in its decision, whether by a Judge alone or with a jury, must always be the long lapse of time, the conduct of the parties, and their dealings with the very subject matter of dispute.

In most cases, if parties enter into a partnership arrangement, and soon after one of them discovers that his co-partner has not brought into the firm some agreed on money or property, the only remedy resorted to would be

to rescind the contract. But if the partners go on for years acting in every way as if the contract were valid and binding, dividing profits on the basis originally agreed upon, it would hardly be expected that at any time within the statutable limit an action of deceit would be brought, such as we have now before us.

I have never met with or heard of a case of this character.

I think the very least that must be expected from any one seeking a remedy like the present, is a proof of his case by evidence of undoubted clearness and proof of admitted cogency.

I think the case fails both on the merits, and in its frame-work, and that the bill should have been dismissed.

BURTON, J. A.—This case, upon the amended claim, is neither more nor less than a common law action for deceit, and, if maintainable at all, is maintainable by the plaintiffs, and by them only.

If the engagement entered into by the parties to this suit became, on its adoption by the corporation, a contract with them, I can well understand the corporation, or possibly a shareholder on behalf of himself and the other shareholders, filing a bill to compel the defendants to make good the representation contained in the contract, if the evidence warranted it; but that is a very different matter from holding that the corporation could maintain an action for deceit upon a representation made, not to them, but to these plaintiffs; assignments of choses in action have not yet extended to that length.

But assuming the plaintiffs' action maintainable, the principle upon which the damages have been assessed is manifestly wrong. If the defendants had discovered that they had made a wrong statement immediately after the incorporation, and had decided to make good the loss, they would have paid the amount into the funds of the company, and not to the plaintiffs. The plaintiffs were not entitled to that amount, but it was a fund in which all the

shareholders were entitled to participate to the extent of their interest in the company. The damages assessed place the plaintiffs in a far better position than they would have occupied had the alleged representations been made good. I am of opinion therefore that, under any circumstances, the verdict and judgment cannot stand for the amount which has been assessed.

But I agree with the Chief Justice that, having regard to the onus of proof and the circumstance that fraud must always be distinctly and clearly proved before the plaintiffs can recover in an action of this kind, that the evidence falls far short of what is usually required in this kind of action; and this, coupled with the delay in setting up the claim and the death of Graham, who might have given material evidence, tends to shew that the plaintiffs' claim is one which should have been scrutinized with great caution.

As regards the Windsor bonus, the evidence is of the most shadowy description. It must be borne in mind that Neelon knew nothing of that bonus. He had received a bonus, not from the town of Windsor, but from his partners, Messrs. Campbell & Graham, for bringing his boat into the arrangement; but he was no party to the other bonus in any way.

Mr. James H. Beatty, when asked what was said about it, says: "I am not positive whether it was Mr. Neelon or Mr. Graham brought that matter up. It is not very clear to my memory. My remembrance now is, that it was brought in immediately after or about the time that we were speaking about the mail subsidy, and it was brought in in this way: he said there, 'there is \$2,000 more from the town of Windsor.'" So that Mr. Neelon could scarcely be held liable for making a fraudulent misstatement in reference to this upon this evidence, and Campbell was not present.

Mr. Neelon denies that such a representation was made; and the matter of the term which the engagement entered into had to run was naturally a matter of discussion and

arrangement, whether any portion of the bonus remained unpaid or not.

Upon the other question—the representation as to the mail contract—all parties seem to agree that Neelon had no personal knowledge upon the subject, and Mr. Beatty admits that he was himself under the impression that they had no written contract, and was surprised when he heard the statement that they had.

Neelon denies that he made any such statement, but referred them to Campbell, and in this he is supported by one of the plaintiffs' witnesses, and this received further confirmation from the fact that Campbell was again referred to by Neelon at the time the contract was signed.

The evidence on the whole leads me to the conclusion that Neelon had not in fact, and did not profess to have, any knowledge on the subject, and referred the parties to Campbell; but that it was regarded as so unimportant, that the values were arrived at, and the basis of the contract concluded without any communication with Campbell, except that referred to at the signing of the contract.

It is no doubt alleged on the one side and denied on the other that Campbell on that occasion misrepresented the nature of the contract. That he could at that time have had any motive for misrepresenting seems incredible, but the learned Judge seems to have preferred the evidence of the plaintiffs; assuming, however, that view of the case I do not see how the plaintiffs can recover. Neither fraud without damage nor damage without fraud gives a cause of action. The only damages the learned Chief Justice has assessed are items which I believe we all think these plaintiffs were not entitled to claim as damages, and he has not found that they have sustained any other damage, and I confess I feel it difficult to lay my finger upon any evidence which establishes that they have sustained any. If there had been a binding contract for the four years there would be the co-relative obligation upon the company to run an additional boat to carry the mail, and it is by no means clear that it would not have been run at a loss.

I agree therefore with the other members of the Court in allowing the appeal and dismissing the action.

I cannot myself see the application of the case referred to by the learned Chief Justice in 3 Kay & J. 230, to the present.

The defendants there had entered into a provisional contract to purchase a mine, which they agreed to sell for their joint benefit to a company about to be formed. They were deceived by one of their number into agreeing to pay £20,000 more for the property than the vendors were willing to take; there being a secret agreement between their co-purchaser and the vendors, that they would repay to him that sum out of the purchase money.

The defendants, all with the exception of the one who committed the fraud, then formed themselves into a committee of management, being still ignorant of the surreptitious agreement, and issued a prospectus stating that a contract had been entered into for the purchase of the property at £125,000, which was £20,000 more than they or the company would have given had the facts been made known to them at the time. The Court there held the transaction not only void as between the fraudulent purchaser and his co-purchasers, but that the defendants, as members of the committee, occupied the position of agents or trustees for the intending purchasers, the company; and under a well understood law of equity, neither of them could retain a sum of money which belonged in fairness to the persons for whom they were all acting: but I do not see how that can be any authority for such an action as the present, if the company's name were substituted for that of the plaintiffs.

PATTERSON and OSLER, J.J.A., concurred in allowing the appeal, and dismissing the action in the Court below, with costs.

Appeal allowed, with costs.

[This case has since been carried to the Supreme Court.]

HALL V. COLLINS BAY RAFTING AND FORWARDING
COMPANY.

Chattel mortgage not under seal—Delivery—Advances—Lien—Jury.

The plaintiff sued for conversion of certain "withes lying on the island in the mouth of the river Moira," claimed by him under a written instrument, not under seal, whereby A., the owner, assumed to assign the withes to the plaintiff, as security for money lent. The defendants asserted a lien on the withes for advances to A., and also alleged that there had been an actual delivery thereof to them, under which they had taken possession prior to the plaintiff's mortgage.

Held, that the instrument was a good mortgage, though without seal, and was not void for want of registration as against the defendants claiming under the alleged prior delivery. The alleged lien for advances could not be enforced against the plaintiff, who was found by the jury to be an innocent mortgagee for value; and the jury having upon contradictory evidence found against the alleged prior delivery, the refusal of the Judge of the County Court of Hastings to disturb the verdict was affirmed.

Paterson v. Maughan, 39 U. C. R. 371, approved of and followed.

THIS was an appeal by the defendants from the judgment of the Junior Judge of the County Court of Hastings, discharging an order *nisi* to set aside the verdict of the jury rendered at the trial, in favor of the plaintiff.

The action was for trespass and conversion of a quantity of withes.

By their statement of defence, the defendants set up an agreement made between themselves and one Arkles, whereby he agreed to deliver to them on or before the 1st June, 1883, at Collins Bay, a quantity of rafting material at specified prices, *inter alia* 50,000 good withes, of usual quality and size, at 3½ cents each.

That afterwards the defendants paid Arkles several sums, in the whole amounting to \$650, on account of goods supplied and to be supplied to them under the agreement, and Arkles delivered from time to time part of the goods which he had agreed to furnish, and among them the withes in question, in part fulfilment of the contract, of which withes defendants took possession by marking them with the letters *l a* for the purpose of identification; such delivery and marking having taken

place before the alleged purchase by the plaintiff, at which time the withes were the sole property of the defendants; and that the sums paid to Arkles were more than was due to him under the agreement.

The plaintiff said that he lent Arkles \$200 upon the security of the withes. They were then lying on Bogart's island; Arkles and he went down to look at them; they went to the wharf, but could not get across to the island because of the water on the ice; they looked across and Arkles delivered the withes to me "till I got my money back again," those were his words. He said he had given possession to no man, and there was no mark upon them nor claim against them. A memorandum of the agreement was drawn up and signed, dated 14th April, 1883, between the parties, purporting to be collateral security for a note of \$200 of the same date.

By this agreement Arkles delivered up to and put in possession of Hall "all the withes owned by me now lying on the island, in the mouth of the river Moira;" said withes being 10,000, &c.

The defendants afterwards took possession of the withes.

The other facts and arguments appear in the judgment of Osler, J. A.

The appeal was heard on the 25th and 26th days of November, 1884.*

Bethune, Q.C., and *Clute*, for the appellants.

Lash, Q.C., and *Burdett*, for the respondent.

December 18, 1884. OSLER, J. A.—I am at a loss to see on what ground we can reverse the judgment of the learned Judge of the County Court.

It appears that Arkles had agreed to get out certain rafting timber and material, including a quantity of withes, for the defendants, and to deliver them at Collins Bay, on or before the 1st June, 1883, for certain prices mentioned in the agreement, which, in the absence of special provi-

**Present*:—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, J.J.A.

sion on the subject, would be payable on the delivery of the material.

The defendants, however, at Arkles's request, made advances to him from time to time to the extent of \$650 on account of the contract.

I think we have nothing to do with the subsequent dealing between Arkles and the defendants in regard to the timber, though it was no doubt a circumstance very fit to be taken into consideration by the jury in estimating the value of the evidence of the transaction relating to the withes, which I am about to refer to.

Arkles and the defendants do not entirely agree as to what passed about the timber. The former admits that it or some of it was marked, but says that the defendants were not to take it—drive it—until they had paid him a further sum on account. At all events they got it, and it is not in question here.

Arkles had also got out the withes which are in question. He had brought them down as far as the mouth of the Moira, and placed them on Bogart's Island there. The defendants had already made advances on the faith of the delivery of these withes and other material, and they allege that after they had been placed on the island they made a further advance of \$50, and Arkles agreed that they should be at liberty to mark them there and take them away. That in pursuance of this agreement they did mark them. Arkles denied this, and swore that he neither gave the defendants permission to mark them, nor was aware that they had done so. He subsequently borrowed \$200 from the plaintiff, and gave him the withes as security therefor by an instrument in writing not under seal, the terms of which, without an actual delivery, were in themselves sufficient to pass the property in the withes to him: *Flory v. Denny*, 7 Ex. 581; *Reeves v. Capper*, 5 Bing. N. C. 136; *Halpenny v. Pennock*, 33 U. C. R. 229.

In *Paterson v. Maughan*, 39 U. C. R. 371, 379, Harrison, C.J., says: "There is nothing in the objection that the mortgage was not sealed. It is now firmly settled that

there may be a mortgage of chattels without deed." That was a case in which the mortgage was signed merely by one of the partners in the firm name.

In *Thompson v. Pettitt*, 10 Q. B. 101, an agreement not under seal to give a mortgage on fixtures, was held sufficient, the terms of it vesting an immediate interest. See also *Milton v. Mosher*, 7 Metc. 244; *Despatch Co. v. Bellamy*, 12 N. H. 205.

In the absence of any stipulation that the property in the withes should vest in the defendants as they were manufactured or got out—as to which see *Kelsey v. Rogers*, 32 C. P. 624—it would remain in Arkles until he had delivered them under his contract, or under some further agreement. There was nothing to prevent him from defrauding the defendants by selling or otherwise disposing of them in the meantime.

It is contended that the defendants had a lien on them for their advances, and I think they probably had an interest which they could have enforced against Arkles or his assignee in insolvency, or for the benefit of creditors, and might have restrained Arkles from disposing of them without satisfying their claim: *Rusden v. Pope*, L. R. 3 Ex. 269; *Engelback v. Nixon*, L. R. 10 C. P. 645. But this is not a right which could be enforced against an innocent purchaser or mortgagee for value, which the plaintiff is found to be. See *Mitchell v. Goodall*, 5 A. R. 164, 170.

Then the question was, whether there was in fact an agreement to take delivery at any other time and place than that stipulated for?

The defendants asserted that there was. Arkles denied it. That was a question for the jury at the trial, at the very threshold of the case, and there was evidence both ways. I think a finding for the defendants would have been more satisfactory, as the evidence is reported to us, but it cannot be said that their finding is so unreasonable that it should have been set aside. The learned Judge took that view of it, and I think the appellants have not shewn that he was wrong.

The appellants urged that under the Chattel Mortgage Act the plaintiff could not recover. I do not see its applicability. Against an execution at the defendants' suit, or a subsequent purchase by them, the statute would be a bar. But as between Arkles and the plaintiff the property passed by the written contract. The defendants took possession under the authority of the alleged delivery, which Arkles denied, and which was one of the matters in issue.

PATTERSON, J. A.—I agree that we cannot allow this appeal, and I desire to say only a few words in addition to what my brother Osler has said. One cannot help feeling that the defendants may have received rather scant justice at the hands of the jury. But there is one thing that tends to lessen our sympathy for them, and that is their want of business-like care for themselves. They make an agreement in writing for the delivery to them at Collins Bay of certain timber or rafting stuff, for which they are to pay certain prices—the term “on delivery” is not expressed, but is clearly implied in law.

Then they advance money which their agreement does not require them to advance, and omit to protect themselves by the simple precaution of putting in writing whatever they thought necessary for their security for their advances. Not having done so, it became a question for the jury whether they had, after their advances were made, taken security for the withes in question by some act which would give them either the property, or a lien at law, or a charge in equity. This question was left to the jury with a charge very favorable to the defendants. The jury found against them, and when the evidence is looked at, whatever opinion we may be inclined, from reading that of Arkles the contractor, to form respecting his honesty in dealing with the defendants, or his honesty or candor in the witness box, it cannot be said that the verdict was unsupported by evidence. The learned Judge dwelt upon the improbability that business men would advance \$650 without taking means to protect themselves

by securing, by delivery, the property made by their money. It was certainly open to the jury to say that these defendants avow having done that unbusiness-like thing, for it is not pretended that any attempt at procuring delivery, or marking of the timber, or legally identifying that which was got out with the advances, was made until after a good deal of the money was spent. Therefore, the defendants, however much they may feel aggrieved by the verdict, cannot fairly say that they did not contribute to their own misfortune.

Counsel for the defendants took three objections to the Judge's charge.

The first relied on the Chattel Mortgage Act, but, as pointed out by Judge Fraick in the Court below, and by my brother Osler, the defendants are neither entitled as creditors nor as subsequent purchasers or mortgagees, to set up the Act against the plaintiff.

The second objection was that the plaintiff had shewn no title. This is answered by the case of *Flory v. Denny*, 7 Ex. 581, to which my brother Osler refers. If the memorandum drawn up by Mr. Merrill, and signed by Arkles, had been also sealed by him, there would be no question of its operation as a mortgage of the goods. *Flory v. Denny* decides that it is a good mortgage of chattels without seal. As far as I am aware, this doctrine rests only on this one decision. I should not have deduced it from the case of *Reeves v. Capper*, 5 Bing. N. C. 136, to which Pollock, C.B., refers as authority, because in that case there was an actual delivery of the chattel to the mortgagee, although it was returned to the possession of the mortgagor; and the passage in Littleton (sect. 365) quoted by the Chief Baron, I understand to refer only to a parol condition or defeasance.

In *Addison* on Contracts, *Flory v. Denny* is cited as authority for the proposition that "a mortgage of goods and chattels may be made by simple contract as well as by deed." I find the case noted in *Smith's Leading Cases* under *Coggs v. Barnard*, as deciding that a mortgage of

goods may be made by writing without deed ; and in the third edition of *Fisher* on Mortgages it is added to the citation of Litt. sec. 365, and *Reeves v. Capper*, 5 Bing. N. C. 136, as authority for the doctrine that "personal chattels, may be the subject of securities for the validity of which no deed or writing is necessary." The case does not appear to be noticed in *Benjamin* on Sales, or in any text book at which I have looked except those I have mentioned. But I find no doubt suggested of the law laid down during the time, almost thirty years, since the case was decided, and I see no reason why we should not act upon it.

The third objection related to the measure of damages, and is not raised before us.

I do not wish to give any opinion upon a question which might perhaps have arisen, if such a state of facts were presented, either by tracing into particular timber moneys advanced for the purpose of getting out that timber, or otherwise, which would give an equitable charge upon the property. Whether in such a case a person in the position of the plaintiff could now maintain a subsequently acquired legal title, on the ground that he was a purchaser for value without notice, apart from the operation of the Bills of Sale Act, may, under our present system, be open to debate, and I allude to the facts of this case for the purpose of shewing that it does not now arise for decision. I do not say that it could properly have been left to the jury to find upon the evidence any thing more than what was left to them, and I suppose they would probably have found against the defendants any questions involving title in them either equitable or legal.

We have at present to deal only with those actually left to the jury, and upon them it is impossible to differ from the learned Judge in the Court below, or to say that he ought to have disturbed the verdict, or upon any grounds to have given judgment for the defendants. I therefore agree that we must dismiss the appeal, with costs.

HAGARTY, C.J.O., and BURTON, J.A., concurred.

Appeal dismissed, with costs.

HOOVER V. CRAIG AND HUNTER.

Replevin—Justification—Warrant—Taking—Detention—Jurisdiction.

In an action of replevin brought in the County Court of Haldimand for a mare taken by the defendants from the plaintiff's close in that county, removed to the county of Brant, and there detained until replevied.

Held, that the taking could not be justified under a warrant issued for the arrest of the plaintiff on a charge of stealing the mare; and although the original taking was justified under a search warrant issued in Haldimand to search the plaintiff's premises in Haldimand, for the mare and to bring it before a Justice of that county, yet the subsequent removal to the county of Brant, and detention there were not, and constituted the defendant a trespasser *ab initio*, and therefore the County Court of Haldimand had jurisdiction to replevy the goods in Brant.

THIS was an appeal by the plaintiff from the judgment of the County Court of the County of Haldimand, directing that the damages awarded by the jury against the defendant Craig should be reduced to \$10, or in the event of the plaintiff refusing to accept that sum, that there should be a new trial, without costs, and setting aside the verdict for the plaintiff against the defendant Hunter.

The action was one of replevin for a mare, the defendant Hunter being a constable, and the defendant Craig a claimant of the mare.

The facts sufficiently appear in the judgments.

The appeal was heard on the 22nd of April, 1885.*

J. K. Kerr, Q. C., for the appellant.

Valentine Mackenzie, Q. C., for the respondents.

May 12, 1885. PATTERSON, J. A.—This is an action of replevin, brought in the County Court of the County of Haldimand, for a mare which the plaintiff in his statement of claim alleges to have been taken by the defendants from his close in the county of Haldimand, and unjustly detained.

The defence is divided into five pleas.

The third and fourth pleas are justifications under a warrant issued in the county of Brant on an information

**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

laid there by the defendant Craig against the plaintiff for stealing the mare, which warrant was executed in the county of Haldimand by the defendant Hunter arresting the plaintiff, on which occasion, these pleas allege, Hunter seized and detained the mare for the purpose of the investigation of the criminal charge.

It is alleged that the warrant was duly indorsed by a Justice of the Peace for Haldimand. That fact is not made certain by the evidence; but whether so indorsed or not, there was no authority given by that warrant to either defendant to take the mare.

I need say no more of the third or fourth pleas.

The second plea denies that the mare was the property of the plaintiff, and alleges it to have belonged to Craig. The jury found against that plea, the learned Judge did not find fault with the verdict in that respect, and we are not asked to differ from him.

In the first plea both defendants deny the detention of the mare, saying nothing of the taking.

The fifth plea is by Hunter alone, and is a justification of the taking and detention under a search warrant, issued in Haldimand by a Justice of that county, upon an information laid by the defendant Craig, directed to all or any of the constables or peace officers in and for the county of Haldimand, to search the plaintiff's premises in Haldimand for the mare, and, if found, to bring it and also the body of the plaintiff before a Justice in and for the county of Haldimand, to be disposed of and dealt with according to law; the defendant Hunter averring that he was a constable for Haldimand, and under the alleged warrant seized and detained the mare.

There was a verdict for the plaintiff with \$75 damages.

It was moved against, and the learned Judge, after argument, held that Hunter was not liable, being justified by the search warrant, and that the damages assessed against the defendant Craig were excessive. His decision was, that the judgment against Hunter should be set aside with costs of the action; and that, unless the plaintiff

consented to reduce the damages against the defendant Craig to \$10, there should be a new trial, without costs.

As far as one can judge from the references to the argument which the learned Judge makes in his judgment, the nature of the action, as simply an action of replevin, would appear not to have been always kept in view, and from that oversight has probably arisen whatever error there is in the judgment.

The search warrant was entrusted to a constable named Kniffen, who was specially named in it, although it was addressed in the ordinary form to all the constables of the county. Hunter went with Kniffen to the plaintiff's residence, or was there with him, and actually took the mare, breaking the lock of the stable for that purpose. He did not deal with the mare as directed by the search warrant, but he took it to Brant. It was in that county when replevied, and there was no justification for its detention there.

Therefore, even if the original taking were justified, the right to replevy could not be resisted for want of authority to detain.

Thus it would appear that the verdict against Hunter was right.

It is not so easy to find upon the evidence, as reported to us, any clear ground for charging the defendant Craig in this action; but, as a new trial may take place, it is better not unnecessarily to discuss the evidence we have, or to speculate on what may be shewn at another trial.

A question of the jurisdiction of the County Court has been raised, but I do not think it creates any difficulty.

The Replevin Act, R. S. O. ch. 53, sec. 4, declares that where the value of the goods does not exceed \$200, and where title to land is not in question, the writ may issue from the County Court of any county wherein the goods have been distrained, taken, or detained.

I understand this to require the plaintiff to shew such a distress or taking or detention within the county as would support an action. In other words, I think he must shew

a wrongful taking or detention in the county ; and if he does so the writ may issue to the sheriff of another county where the goods may happen to be.

In this case, in order to shew jurisdiction in the County Court of Haldimand to replevy the goods in Brant, it was essential to prove a wrongful taking in Haldimand.

The pleadings allege on the one side, and justify on the other, a taking in Haldimand. Is that justification established ? I think it is impossible so to hold. The defendant Hunter could, no doubt, have justified the taking of the mare, and also the detention, under the warrant that Kniffen had, if he had acted *bond fide* in the execution of that warrant, and had done nothing more than the warrant authorized the constable to do. But he took the mare into another county, which the warrant did not authorize him to do, and the doctrine of the *Six Carpenters' Case*, 1 Sm. L. C. 132, compels us to hold that he was a trespasser *ab initio* without further inquiry into the motive with which he originally interfered with the mare.

The result is, that the verdict against Hunter ought not to have been set aside on the legal question ; and as to him the appeal should be allowed, with costs.

The plaintiff's only complaint with respect to the defendant Craig is, that the learned Judge considered the damages too high.

That is a matter on which we cannot interfere ; but we should simply direct that the order made as to Craig should be made to apply to both defendants ; that is to say, if the plaintiff assents to the reduction of his verdict to \$10, and so notifies the Clerk of the County Court within ten days from this date, the order *nisi* should be discharged with costs, and the plaintiff should have judgment against both defendants, with costs. Failing such election and notice the order should be absolute for a new trial as to both defendants. The general rule is, that a new trial for excessive damages is only granted on payment of costs by the defendant, but as the learned Judge has thought the new trial should be without costs, the order should go in that shape.

OSLER, J.A.— It would appear that the mare in question was taken from the plaintiff's premises by the defendant Hunter upon a search warrant directed to one Kniffen, under or in aid of whom Hunter professed to be acting.

This warrant was issued by one Phillips, a justice of the peace for the county of Haldimand, upon the affidavit of the defendant Craig, alleging that the mare had been stolen from him by Hoover.

The warrant, pursuant to the statute, Indictable Offences Act 32-33 Vict. ch. 30, sec. 12, (D.,) required Kniffen to bring the goods, if found, before the justice by whom it was issued, or some other justice of the peace for the county of Haldimand. It was said that Hunter had also in his possession when the search warrant was executed a warrant directed to himself for the arrest of Hoover, issued by one Hamilton, a magistrate of the county of Brant. It is not clear whether this warrant was produced at the trial or not. It was said not to have been properly backed or indorsed by a Haldimand magistrate, but Hoover had nevertheless been arrested upon it the day before the execution of the search warrant, and taken to the county of Brant. On that day, but before the execution of the search warrant, the magistrate discharged him out of custody and cancelled the warrant to Hunter, no one having appeared to sustain the charge. Hunter had no notice of this. He took the mare to the county of Brant. What he did with her, or in whose custody he placed her there, is not stated. There are some allusions in the report of the evidence, from which we may infer that the plaintiff was again arrested, and tried before the County Judge and acquitted.

The plaintiff's title to the mare was very clearly proved. The learned Judge held that as Hunter was "merely an officer of the law, doing what he had a right to do under the warrant," or as he elsewhere says, "a constable of the county of Haldimand acting within the scope of his duties," he was not liable.

This, however, being an action of replevin, we are not concerned with the question of the *bona fides* of the con-

stable's proceedings. The only question is, what legal justification he had for the taking and detention of the mare.

Mr. Mackenzie argued that he had the right to take it under the warrant for Hoover's apprehension. We cannot see, however, that there was any satisfactory proof that such warrant had been properly backed by a Haldimand magistrate, and I am aware of no authority for saying that a warrant for the apprehension of a felon justifies the constable at any time after the arrest in searching for, seizing, and detaining the property alleged to have been stolen. That he may take it if found on the person or in the actual possession of the felon at the time of the arrest I do not question, but that is not this case: see *Mellor v. Leather*, 1 E. & B. 619; *Toml. Law Dict.*, vol. 1; *Tit. Const. IV.* As to the alleged cancellation of the warrant, which the plaintiff relied on, see *Barons v. Luscombe*, 3 Ad. & Ell. 589. If the constable was otherwise in a position to justify under it, its cancellation or suspension by the magistrate could not deprive him of that right, if he acted without notice of such suspension.

As regards the search warrant, I cannot see that any difficulty is caused by the fact that it was directed to Kniffen. There is quite enough to justify the inference that Hunter was acting in aid of Kniffen and at his request in the actual taking of the property.

The real difficulty is, that this warrant required the constable executing it to take the goods before a justice of the peace for the county of Haldimand, and therefore could be no justification for him in removing them out of that county into the county of Brant, which is what Hunter did. The question then arises, whether in doing so he became a trespasser *ab initio*, for if he did not, the original taking in Haldimand being justified by the warrant, the action could not as I think be properly brought in the County Court of that county: R. S. O. ch. 43, sec. 18, sub-sec. 5, ch. 53, secs. 4, 6.

The rule is, that "wherever the person, who at first acted with propriety under an authority or licence given by law, afterwards abuses the authority or licence, he becomes a trespasser *ab initio*:" *Bac. Abr. Trespass B. 648*; and the reason given for it is, "that where the law has given an authority, it seems reasonable that the law should, in order to secure such persons as are the objects thereof from the abuse of the authority, when it is abused, make everything done void; and leave the abuser in the same situation as if he had done everything without any authority. And this agrees with the maxim *actus legis nemini facit injuriam*:" *Bac. Abr. Trespass B. 650*. This reason is said to be preferable to one that has been sometimes given, namely, that the law intends, from the subsequent tortious act, that there was from the beginning a design to be guilty of an abuse of the authority, a reason which would be equally applicable to a subsequent abuse of an authority in fact, which does not make the abuser a trespasser *ab initio*. See also 1 Sm. L. C. 7th ed. pp. 132, 136; *Cooley on Torts*, 461, 462; *Hilliard on Torts*, 105, 106, 107; *Milton v. Green*, 5 East. 233; *Gates v. Lounsbury*, 20 Johns. N. Y. 427; *Chit. on Plg.*, 7th ed., pp. 193, 201.

Hunter's action in taking the property into the county of Brant would appear, so far as we have any evidence of it, to be quite indefensible. In doing so he was abusing an authority given him by the search warrant, and therefore became, according to the authority I have referred to, a trespasser *ab initio*, unable to justify under it either the original taking in Haldimand or the subsequent detention in Brant. For this reason also, as the plaintiff complains of the unlawful taking, the action is properly brought in the county of Haldimand.

As to the defendant Craig, the plaintiff contends that the learned Judge erred in reducing the damages to \$10. The effect of the order, however, is, that there is to be a new trial unless the plaintiff consents to reduce the damages.

The recent case of *Belt v. Lawes*, 12 Q. B. D. 356, shews that there is no objection to that course where the defen-

dant's complaint is only that the damages are excessive, and he cannot otherwise impeach the verdict. The defendant Craig does not seem to have objected to this disposition of the order *nisi*. The learned Judge was of opinion that the damages were too large, and I think the proper course will be to allow the appeal with costs as against the defendant Hunter, and to direct that an order absolute shall issue in the Court below for a new trial, without costs, as against both defendants, unless the plaintiff within ten days signifies to the clerk of the Court his consent to reduce the damages to \$10, and to accept payment of that sum with full costs of suit against both defendants, in which case the order *nisi* in the Court below is to be discharged, with costs.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

The plaintiff having elected to reduce the amount of his verdict as suggested, the certificate was drawn up allowing the appeal as against Hunter, with costs: and directing judgment to be entered for ten dollars against both defendants in the Court below, with costs.

CANADIAN LAND AND EMIGRATION COMPANY V. THE
MUNICIPALITY OF DYSART ET AL.

Assessment—Court of Revision—Fraud—Appeal—Stipendiary magistrate.

In an action to restrain the defendants, the corporation of the township of Dysart and the members of the Court of Revision thereof, from increasing the assessment on the plaintiffs' lands in that township to \$243,113.75c., an increase of \$132,000 over the previous year, and from levying taxes thereon, the plaintiffs alleged that the proceedings of the Court of Revision were all parts of a fraudulent and improper arrangement and conspiracy that had been entered into before the holding of the said Court of Revision by the members thereof in conjunction with others, to increase the assessment of the plaintiffs. No evidence was adduced as to the actual or assessable value of the lands, but the plaintiffs stated that the highest bid they had had for them was \$80,000. It was further alleged that the members of the Court of Revision had before their election as councillors, complained that the company's assessment was not high enough, and had procured their election partly through announcing that if they were elected the assessment would be increased, and that they had held a secret meeting with other persons and arranged for bringing on appeals to that Court.

Held, [affirming the decision of the Chancery Division, 9 O. R. 495,] that the matters complained of were not sufficient to affect the judgment of the Court of Revision so as to render it void for fraud; and that the plaintiffs had no remedy other than by an appeal to the Stipendiary Magistrate of Haliburton, under R. S. O. ch. 6, sec. 23.

THIS was an appeal by the plaintiffs from the judgment of the Chancery Division (9 O. R. 495, 520), affirming the judgment of Ferguson, J., at the trial dismissing the action upon the defendants' demurrer *ore tenus*.

The action was against the municipality of the township of Dysart and five members of the municipal council, who were the persons composing the Court of Revision, to restrain the defendants from increasing the assessment on the plaintiffs' lands in the township of Dysart to \$243,113.75, and from levying taxes on such assessment.

The facts are stated and the authorities collected in the former report.

The appeal was heard on the 29th day of May, 1885.*

S. H. Blake, Q. C., and *W. Cassels*, Q. C., for the appellants.

McCarthy, Q. C., for the respondents.

**Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

June 23, 1885. HAGARTY, C. J. O.—I have not been able to satisfy myself that the charges brought by the appellants against the Court of Revision, or its individual members, are sufficient to bring this case within the ordinary rule affecting a decision or judgment impeached for fraud, and as being therefore void and warranting our interference.

There is no allegation of the tender of any evidence by the appellants, or the refusal of the Court of Revision to hear evidence. There is the general allegation that the proceedings "were all parts of a fraudulent and improper arrangement and conspiracy, that had been entered into before the holding of the said Court of Revision, by the said members of the said Court of Revision among themselves in conjunction with the said Frederick Dover, Alexander Niven, John F. Young, and others, to increase the said assessment of the said company in the manner aforesaid."

Now this must of course be read as the appellants' summary of their various allegations, and we have to examine them carefully.

The matters charged as shewing that the assessment was not an honest adjudication by the Court of Revision, but was made in bad faith may be thus summed up: that it was increased by the amount of \$132,000 over the amount of the preceding year: that the highest bid the company had for their property was \$80,000: that the value thereof had diminished instead of increasing: that the Court gave its judgment immediately after hearing without consultation or retiring to consider: that the members of the Court, before their election as councillors, had complained that the company's assessment was not high enough, and procured their election partly through announcing that if they were elected the assessment would be increased: that they had a secret meeting (before the meeting of the Court) with some other persons, and arranged that the settlers should be induced to appeal against their own assessments in order to give ground for the Court to raise the company's assessment, which at that meeting they

agreed amongst themselves was too low, and should and would be increased: that they arranged a programme for securing said appeals, and the result was over sixty appeals were lodged, and it was also arranged that Frederick Dover, brother of one of the members of the Court, should appeal against the company's assessment: that said Dover, being a man of great influence, by unfair arguments induced the Court fraudulently and improperly to increase the assessment.

Several allegations are made as to the absence of proper proof as to the complaints of persons who alleged that their lands had been assessed higher than the company's land.

If we were to pronounce illegal some of the proceedings here complained of, I am afraid we would be exacting an ideal perfectibility in the working of our municipal system. We cannot hold it to be illegal, that candidates for the council should freely discuss or advocate in their canvas the propriety of raising any existing assessment on lands held by companies, or individuals, on the ground of such lands having a higher assessable value. Nor can we call it absolutely illegal to discuss, or even to advise, the lodging of appeals for the purpose of having the questions discussed and decided. The like view must be taken as to alleged meetings at which members of the Court of Revision generally, the members of the council, with township officers and others, met to discuss this question of assessable value, or to arrange for having it properly raised before the Court.

It may well be suggested that the members of the Court of Revision, aware of the duties that they would have to perform, should properly abstain from taking any active part in previous discussions on the subject or arrangements as to appeals.

We have to deal with positive charges of fraud and bad faith, not with alleged departures from a proper standard of judicial reserve and outward shew of impartiality. As already remarked, no evidence offered by the appellants was rejected.

Section 56 of the Assessment Act, sub-sec. 16, gives considerable latitude to the Court as to the taking of evidence, and we cannot lay down any absolute rule on the subject.

It is to be observed that the appellants do not state affirmatively anything positive as to the actual assessable value of their lands to shew that they are not really liable to the assessed value. They seem to put this case on a number of facts as to offers or attempts to sell, or the amount of previous assessments, &c., from which we are asked to infer that the value is placed too high.

It appears to me that when the appellants state a number of matters, and then declare that they were committed with a fraudulent intent, and were all parts of a fraudulent arrangement and conspiracy, we must examine what the acts were, and not content ourselves by accepting, as admitted by the demurrer, the fraud and conspiracy charged.

If the value actually assessed was not in itself too high all the allegations as to the declared opinion of candidates or the discussion or meetings, or the appeals taken for the purpose of bringing the matter before the Court of Revision, cannot in themselves be held to be fraudulent and to vitiate the decision.

We have also to deal with the objection that the company should have appealed to the Stipendiary Magistrate, acting in that provisional district as the County Judge in ordinary cases. Ch. 6, R. S. O. defines his powers. Section 23 declares that an appeal shall lie from the decision of the Court of Revision of any municipality within the provisional county of Haliburton, to the Stipendiary Magistrate instead of to the Judge of the County Court, and the Stipendiary Magistrate shall have the like powers, and shall perform the like duties in respect of such appeals as are performed by the County Court Judges in other counties.

There would be nothing to prevent a full and fair trial of the merits of the appeal against the action of the Court of Revision. The magistrate would not be bound by it.

He could exercise full powers of review ; could hear all the evidence adduced, call, if he pleased, for further evidence. We have neither the right nor the desire to assume that he would not fairly do his duty and decide justly.

I think the design of the Legislature was to work out the whole system of assessment by the machinery provided. First, the action of the assessor ; Secondly, the appeal to the Court of Revision ; Thirdly, the final appeal to the county Judge or Stipendiary Magistrate.

The law declares (sec. 65) that the decision and judgment of the Judge shall be final and conclusive in every case adjudicated.

I can see nothing in any of the matters urged by the appellants to excuse their availing themselves of this statutable appeal. The intervention of an official like the County Judge, would be the natural corrective of any of the alleged irregular or prejudiced proceedings of a Court of Revision composed of the municipal councillors, and such a functionary might be well assumed to be superior to all local prejudice or improper bias.

The intervention of the Courts in the manner sought for by this appeal would be disastrous to the due working of the municipal system. If the Court of Revision is to be in effect prohibited from enforcing the assessment, what is to be done ?

Apart from the delay in this case into another year, if their action be set aside, are the same men to do the thing over again, to go through the form of hearing the appeal from the assessment ? If their minds had been so made up against this company, as the plaintiffs assert, would it not be an almost useless form to require them again to hear it ?

I am strongly of opinion that the company, on the facts before us, had no course open to them except to appeal to the Stipendiary Magistrate as the statute provides.

BURTON, PATTERSON and OSLER, JJ.A., concurred.

Appeal dismissed, with costs.

PORTEOUS V. MYERS.

Creditors' Relief Act, 1880—Distribution—Costs of first execution.

Held, [affirming the judgment of the County Court of Perth] that the creditor under whose execution an amount in the hands of a sheriff for distribution under the "Creditors' Relief Act, 1880," was levied, and which was insufficient to pay all claims in full was not entitled to priority of payment of the costs of obtaining judgment and execution.

THIS was an appeal by the plaintiff, Ann Porteous, from an order of the Judge of the County Court of Perth, made under the "Creditors' Relief Act, 1880," on the 15th September, 1884, changing the scheme, proposed by the sheriff of the county of Perth, for the distribution of the money levied out of the estate of the defendant.

A writ of *fi. fa.* goods issued on the judgment recovered in this action, which was in the High Court of Justice, was placed in the sheriff's hands on the 27th June, 1884, and under it the sheriff seized the defendant's goods on the same day, and subsequently realized thereout \$1,729.86. Several other creditors of the defendant placed writs of execution or certificates under the Act in the hands of the sheriff, after the seizure, but within the proper time after notice, and the sheriff proposed a scheme for the distribution under the Act, of the amount in his hands, first deducting from the amount levied, his own fees and poundage, a sum for rent, and also the plaintiff's costs of obtaining judgment and execution, amounting to \$515.79. The amount to be distributed, after making these deductions, was \$835.07, and the creditors' claims amounted to \$4,175.35. The other creditors objected to the plaintiff being allowed costs out of the fund in priority to their claims, and made an application to the County Judge to review the sheriff's scheme of distribution.

The County Judge made the order now appealed from, which declared that Ann Porteous was not entitled to her costs of suit in full, but was only entitled to rank ratably with the other creditors by certificate or execution, for the

amount due to her for debt, interest, and costs, and directed that the scheme of distribution should be amended accordingly.

The appeal was heard on the 15th day of June, 1885.*

Moss, Q. C., for the appellant.

J. P. Woods, for the respondents.

October 13, 1885. OSLER, J. A.—The only question which has been argued is, whether the execution creditor, under whose writs the amount now sought to be distributed was levied, is entitled to payment in full of her costs of suit out of the amount so levied, under any provision in the "Creditors' Relief Act, 1880".

Her writs were placed in the sheriff's hands, and the money actually made thereon by a sale of the whole of the debtor's property before any other execution or certificate was received by the sheriff.

The amount so made, however, fell considerably short of being sufficient to satisfy the claim.

Claims were afterwards, and within one calendar month from the day on which the sheriff made the money, lodged by twenty-four other creditors, two of whom were ordinary execution creditors.

The fourth section of the Act, enacts that subject to the provisions thereafter contained, there shall be no priority between or among creditors by execution from Superior or County Courts.

Section 5 then enacts that in case a sheriff levies, (which is here used in the sense of actually makes) any money upon an execution against the property of a debtor, he shall forthwith enter in a book a notice stating that such levy has been made, and the amount thereof; and "such money" shall thereafter be distributed ratably amongst all execution creditors, "and other creditors" whose writs or certificates, given under the Act, "were in the sheriff's hands at the time of such levy," or who deliver their writs or certificates

* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

to the sheriff within one calendar month from the entry of such notice. "Subject, however, to the provisions hereinafter contained *as to* the retention of dividends in the case of contested claims, and *as to* the payment of the costs of the creditor under whose writ the amount was made." It is under the last clause that the contention arises, as the Act makes no other provision for the payment of the costs in question.

Section 7 provides for the proceedings to be taken by the other creditors to entitle them to share with execution creditors, and for the retention of dividends to meet any contested claim. A creditor who delivers to the sheriff a certificate, Form E, of the clerk of the County Court is, from the time of such delivery, to be deemed an execution creditor within the meaning of the Act, and entitled to share, with creditors who have executions in the sheriff's hands, whatever money is made under such executions. And by sub-section 12, on receiving such certificate the sheriff is to make a further seizure of the lands or goods, &c., to the amount of the debt claimed.

Section 10 enacts that where the amount levied by a sheriff is not sufficient to pay the execution debts and other claims, with costs in full, the money shall be applied to the payment ratably of such debts and costs of the creditors after retaining the sheriff's fees.

Section 13 seems to be the only other section necessary to be noticed. It declares that for all purposes, money made on any writ shall be taken to be made on all writs or certificates entitled to the benefit thereof.

If we are at liberty to read clause one of section five as directing the ratable distribution, "subject to the provisions hereinafter contained *as to* the retention of dividends, &c., *and to* the payment of the costs of the creditor under whose writ the amount was made:" in other words, if we can omit the word "as" from the latter part of the clause, the plaintiff is entitled to succeed on this appeal, as we then read the section as containing in itself an express direction in her favor, instead of having to look

elsewhere in the Act for the provisions which entitle her to her costs.

No doubt it would appear to be reasonable, and in accordance with justice, that the costs of a creditor, whose diligence has succeeded in securing for distribution the whole of the debtor's assets, should form a first charge upon such assets, where at the time the goods are sold and the money made there are no other executions in the sheriff's hands. The creditor may have succeeded in establishing his claim only at great expense; and it seems very like a denial of justice that he should be compelled to accept, in competition with other creditors, who merely come in to share the fruits of his victory, a dividend which, as in the present case, does not cover the costs expended in securing it.

I think it is not improbable that the framer of the Act intended to make some provision for a case of that kind, but I find it very difficult to accede to the construction contended for, and to hold that he has done so.

If we say that by force of section 5, the creditor under whose writ the amount is made is entitled to his costs, we are obliged, I think, under section 13 to say that all execution creditors are in the same position whose writs may happen to be in the sheriff's hands at the time of sale. And it would also follow, that each subsequent creditor, under whose execution or certificate a further sum was levied and contributed to the common fund, would be entitled to a first charge upon such sum for his costs of suit, though the reasonableness of that is not so apparent from the prior execution creditor's point of view.

This construction, however, leaves no room for the application of section 10, which, though loosely expressed, does appear to me unmistakably to enact, that when the amount levied is not sufficient to pay the debts and costs in full, it shall be applied to the payment ratably of the debts and costs of the creditors, after deducting sheriff's fees.

This language in terms includes the case before us, as well as the other cases I have referred to, and the result is that the Act has made no provision for priority of payment of the execution creditor's costs in any case, a result always harsh, where other creditors obtain the benefit of the seizure, but in this instance, we must think, productive of shocking injustice, when it is considered, as two members of this Court judicially know, that the plaintiff's judgment was recovered for a sum of \$1500, actually taken from her, to use no stronger expression, by the defendant, and which is thus used to pay his creditors.

I think the appeal must be dismissed, but certainly without costs.

HAGARTY, C.J.O., BURTON and PATTERSON, JJ.A., concurred.

DOMINION BANK V. DAVIDSON ET AL.

Title to goods—Bailee receipt—Warehouse receipt—Chattel Mortgage Act.

The execution debtors, C. & Son, bought the oats in question from persons who shipped them to Toronto consigned to their (the sellers') own order or to the order of some bank other than the plaintiffs; sending the shipping receipt with draft for the price of the oats attached to C. & Son at Toronto. The latter then took the shipping receipt to the plaintiffs who advanced the money thereon to pay the draft, returning the shipping receipt to C. & Son for the purpose of obtaining the oats from the carriers, after taking from C. & Son a receipt in these words :

“Received in trust from the Dominion^a Bank bill of lading for ——— bushels oats, and I hereby undertake to sell the property specified for said bank and collect the proceeds of sale or sales thereof and deposit the same with the said bank, in Toronto, to the credit of same, I hereby acknowledging myself to be bailee of the said property for the said bank.”

C. & Son received the oats from the carriers and warehoused them, taking warehouse receipts in their own name, which they indorsed to the plaintiffs, who then gave up the bailee receipt.

Held, that no property in the oats had passed to C. & Son when the plaintiffs made the advance, and that the latter were therefore entitled at least as equitable owners, as against execution creditors of C. & Son. The Chattel Mortgage Act could have no application, for when the oats first came into the possession of C. & Son, they came charged with or subject to the plaintiffs' title.

THIS was an appeal from the judgment of Patterson, J. A., on an interpleader issue tried by him without a jury, at Toronto, at the Spring Assizes, 1883. The issue was directed to try the question whether certain wheat and oats were the property of the plaintiffs, as against Davidson and others, execution creditors of Chapman & Son.

The learned Judge gave judgment for the defendants as to the wheat, and for the plaintiffs as to the oats, finding that the latter were not the property of the judgment debtors. The appeal was confined to the judgment in respect of the oats, and the only question was, whether they were in fact the property of the judgment debtors, so as to be subject to the defendants' executions as against the plaintiffs.

The appeal, which was on behalf of the execution creditors, the Lennox and Addington Division Grange, was heard on the 1st of December, 1884.*

* *Present*.—HAGARTY, C. J. O., BURTON, MORRISON, and OSLER, JJ. A.

The facts sufficiently appear in the judgment.

W. A. Reeve, for the appellants.

Robinson, Q.C., for the respondents.

January 13, 1885. OSLER, J. A.—I am of opinion that the appeal should be dismissed.

The facts in evidence are very short.

Chapman & Son, the execution debtors, were dealers in grain and produce in Toronto, and were customers of the Dominion Bank.

They bought the oats in question from persons residing in different parts of the country, by whom they were shipped to Toronto, consigned to the seller's order, or to that of some bank, other than the Dominion Bank. The shipping receipt, with the draft attached for the price of the grain, was at the same time sent forward to the execution debtors. They being unable to meet the drafts without the plaintiffs' assistance, the course pursued in all cases was the following. The draft and shipping receipt were brought to the plaintiffs, and the debtors gave them a document called a "bailee receipt," in the following terms:

"Received in trust from the Dominion Bank, B. Lading for — bush. Oats, and I hereby undertake to sell the property specified for said bank and collect the proceeds of sale or sales thereof and deposit the same with the said Bank, in Toronto, to the credit of same, I hereby acknowledging myself to be Bailee of the said property for the said Bank."

Upon receiving this document the plaintiffs procured Chapman & Son's cheque for the draft, and intrusted them with the shipping receipt for the purpose of obtaining the oats from the railway company. In one instance the shipping receipt was indorsed to the plaintiffs by the bank through which the draft was presented, and in others either in blank or to the order of the judgment debtors.

When the grain was obtained from the carriers, it was placed from time to time in the warehouse of one Alfred Chapman; warehouse receipts being taken in the name of Chapman & Son, which they endorsed to the plaintiffs, and

CROSSON V. BIGLEY.

Contract—Illegality—Lord's Day Act—Pleading—Practice—Trial.

In an action upon a contract for the purchase of a horse, the statement of defence alleged that on Sunday the 19th of April, the defendant drove out to the plaintiff's place for the purpose of exchanging a horse, and that on that occasion it was agreed, &c., (stating defendant's version of the bargain).

Held, that this statement was not sufficient to raise the defence of illegality under the Lord's Day Act, but as it was treated at the trial as tendering the proper issue, and as the jury found that the contract was made on a Sunday, the judgment for the plaintiff was set aside and a new trial granted, without costs, with leave to both parties to amend.

AN appeal by the defendant from the judgment of the County Court of the County of York, refusing an order *nisi* to set aside the verdict for the plaintiff entered at the trial.

The statement of claim alleged, that on or about the 15th of April, 1884, the defendant purchased a horse from the plaintiff at the price of \$205, paying at the time and place of sale \$105 in cash; but that a few days afterwards the defendant complained that the horse was unsound, and the plaintiff agreed to rescind the purchase, whereupon the defendant purchased from the plaintiff another horse at the price of \$220; and that the defendant applied in payment on account thereof the \$105 previously paid, and agreed to pay the balance on demand; and the plaintiff delivered the horse, but the defendant never paid the balance of \$115, for which this action was therefore brought.

The statement of defence was as follows:

"1. The defendant denies the statements, &c.

"2. About the 15th of April last, the plaintiff, while in the city of Toronto, offered to give the defendant choice of purchase of two horses for the price or sum of \$205, and guaranteed both the horses to be sound in every respect.

"3. The defendant purchased one of the said horses for the sum mentioned, on condition that the same was a sound horse as guaranteed, and he caused the said horse to be examined by a competent veterinary surgeon, who, after examination, certified that the said horse was unsound.

" 4. Afterwards, on Sunday, the 19th day of April last, the defendant drove out to the plaintiff's place in the country, for the purpose of exchanging the said horse for the other one of the two of which he was offered the choice as before stated.

" 5. On that occasion the plaintiff refused to let the defendant have the other horse, except for the sum of \$220, and the defendant refused to pay the said sum, but it was finally between them agreed that the defendant should take the second or other horse on trial, subject to their agreeing as to the price to be paid in case the defendant was satisfied with the said horse.

" 6. The plaintiff and defendant were afterwards unable to agree upon a price to be paid and accepted for the said horse, and thereupon the defendant offered to return the said horse, but the plaintiff refused to accept the same back.

" 7. The defendant was then, and is now, willing to give up possession of the said horse to the plaintiff.

" 8. The plaintiff claims the benefit of the Statute of Frauds, 29 Chas. II. ch. 3, sec. 17.

" 9. By way of counter-claim, the plaintiff claims to be entitled to a return of the \$105 paid on account of the purchase of the unsound horse returned.

The jury found that the defendant agreed to purchase the horse in question (a grey mare) at the price of \$220, and that the bargain was made in the plaintiff's stable on the Sunday mentioned in the defence; and judgment was entered for the plaintiff for \$115.

The appeal was argued on the 20th of April, 1885.

Schoff, for the appellant. At the trial the appellant claimed the benefit of the Lord's Day Act, and the respondent not then objecting that it was not raised on the pleadings, the appellant is entitled to the benefit of that Act. It was not necessary that the Act should be specially pleaded, and, if necessary, it was sufficiently pleaded.

Plumb, for the respondent. The facts which made the Act apply should, under the present system of pleading, be stated, and the particular provision relied upon should

* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

be pointed out. A general statement of reliance upon the statute is not sufficient, and even that the appellant has not made.

May 12, 1885. BURTON, J. A.—A number of points were raised upon the argument, but they are, I think, reduced to the simple question of whether the defence of illegality was open upon the pleadings; reference being had to the mode in which the question was dealt with at the trial.

From some remarks which fell from counsel upon the argument, and a paper of authorities handed in to the Registrar since, I think a good deal of misapprehension exists as to the cases in which defences of this nature, arising under statutes, require to be specially pleaded.

I took occasion to state during the argument, although my remark was rather confidently questioned by the defendant's counsel, that as regards the Statute of Frauds it was never necessary to plead it specially before the Judicature Act, although the rules under the Common Law Procedure Act, 1856, required that in every species of action on contract all matters in confession and avoidance, including not only those by way of discharge, but those which shewed the transaction to be either void or voidable in point of law on the ground of fraud, or otherwise, should be specially pleaded, being among the instances given of illegality of consideration either by statute or common law.

Very shortly after the passing of similar rules in England, the question arose as to the necessity of setting up the Statute of Frauds by plea. Before the passing of the new rules, Lord Tenterden threw out an opinion in the House of Lords that such a plea would have been bad on general demurrer, but even after the new rules it was held to be unnecessary to plead it; and this was the *ratio decidendi* on *non assumpsit* before the rules, the plaintiff was bound to prove a contract in writing. This was in order to support an allegation in the declaration, and there never was any allegation except that of making the contract; there was nothing in the new rules to alter the evidence by which the plaintiff was required to support it.

But under these rules every matter had to be specially pleaded, which would have been the subject of proof on the part of the defendant, such as illegality, but, as I have pointed out, they did not exempt the plaintiff from proving anything which he would formerly have been required to prove.

In equity it was always different, and a party relying on the Statute of Frauds had to set it up, and it is in consequence of the change effected by the Judicature Act that it now becomes necessary to plead that statute specially.

But illegality rendering the contract void had always since 1856 to be pleaded specially, and the reasoning of the counsel that because it is void by Act of Parliament the Courts are bound to give effect to the objection, whenever taken, and whether pleaded or not, is fallacious.

He urged that, if it had appeared upon the face of the statement of claim that the contract had been made on a Sunday, it would have been demurrable, but I do not agree in this, as it might be quite possible that a defendant might not desire to avail himself of such a defence, and I think it clear that even before the Judicature Act it was necessary to plead such a defence.

I do not think the plea as pleaded is sufficient in itself to raise the defence, but it was treated at the trial as tendering the proper issue, and the case was argued and dealt with on that footing, and the only two issues upon which the jury found related to the sale, which they found at the sum of \$220, and that it took place upon Sunday. If the question as to the sufficiency of the pleading had been then raised, the defendant could have applied to amend, and if such an amendment had been granted, it is but reasonable to assume that the plaintiff would also have asked to amend, so as to enable him to offer evidence upon a *quantum meruit*.

That point was not in question in the Court below, the sole issue for the jury relating to the sale on the Sunday.

The question of any subsequent sale was not raised, and we could not assume the functions of the jury and decide

the questions of fact from which an implied contract might arise.

I think, therefore, that the verdict must be set aside, and the case remitted for trial upon such amendments to the pleadings as the parties may be advised to make.

It will be well, perhaps, for the plaintiff, if he goes down again, to consider the propriety of confining his claim to \$200 ; and as that is probably the extent to which a recovery could be had upon a *quantum meruit*, the parties may do well to consider whether a settlement is not desirable without further litigation.

The appeal should be allowed, I think, without costs, and the verdict and judgment below set aside, and a new trial ordered, without costs.

HAGARTY, C.J.O., PATTERSON and OSLER, JJ.A., concurred.

Appeal allowed, without costs.

EWART V. STUART ET AL.

Assignment for creditors—Partnership—Separate estate of partners—Preference—Interest—R. S. O. ch. 118.

McP. Bros., a firm composed of two partners, by deed assigned to the plaintiff the partnership property and assets only, upon trust to pay the joint creditors only. The deed authorized the plaintiff to pay creditors' claims either with or without interest.

On the day before the assignment the sheriff had seized the partnership property under two writs of execution (one of which he swore at the trial he thought was against one of the partners only, but there was no further proof of this), and put the plaintiff in possession as his bailiff. McP. Bros. then determined to assign to the plaintiff, and it was arranged between the sheriff and the plaintiff that on the execution of the assignment the plaintiff should retain possession subject only to these executions.

Held, that the deed was not void under R. S. O. ch. 118, for intent to prefer the partnership creditors; nor for intent to prefer particular creditors, even if such intent were shewn, by the arrangement between the plaintiff and the sheriff, inasmuch as the assignors were not parties to such arrangement; nor by reason of the provision for payment of creditors' claims with or without interest.

THIS was an appeal from the County Court of Perth by the defendants in an interpleader issue, tried by the Judge of that Court, without a jury. The plaintiff was an assignee for the benefit of creditors, and the defendants were execution creditors of the firm of McPherson Brothers.

The learned Judge at the trial upheld the assignment as against the execution.

The material facts are as follows:

The firm of McPherson Brothers was composed of two partners, D. R. McPherson and J. C. McPherson, and on the 21st December, 1883, there were two executions in the hands of the sheriff of the county of Perth, one at the suit of *Bogue v. McPherson*, and the other at the suit of *Dixon v. McPherson*. The sheriff said he thought one was against the firm, and one against one of the partners only, but the writs were not produced, and he was unable to say which was the individual one.

He seized and put the plaintiff in possession about three o'clock, on the 21st, and the execution debtors then determined to make an assignment. It was arranged between the sheriff and the plaintiff that on this being done, the

plaintiff should retain possession subject only to the executions in the sheriff's hands; and that upon the latter's claim in respect of them being satisfied, the surplus should be paid to or retained by the plaintiff as assignee.

The assignment was executed early on the morning of the 22nd December, and the defendants' execution was delivered to the sheriff at a later hour of the same day.

The partnership property and assets of the firm only were conveyed by the deed, and the trusts were for payment of the joint creditors only. There was evidence that one at least of the assignors had separate creditors.

The appeal was heard on the 14th of May, 1885.*

Wallace Nesbitt for the appellants.

Moss, Q. C., for the respondent.

June 23, 1885. BURTON, J. A.—As I read this assignment, it is intended to pass only the partnership property. I think that is the proper construction of the deed—a transfer of the partnership assets for the payment of the partnership debts, it is a joint transfer of property in which they are jointly interested, and of that only, and the trusts are clearly confined to the payment of the joint creditors.

The property assigned is property which the partners themselves would have no legal right to apply to payment of their separate debts, and no portion of it could be sold on an execution issued by a separate execution creditor. That being so, how does the fact that an assignment is made to a trustee with directions to do that which, in a winding-up of the partnership, the partners themselves were restricted to doing, make that assignment void as a deed made with intent to give a preference within the provisions of R. S. O. ch. 118? The creditors who are entitled to be first paid from the property assigned are all to share ratably, so far as that property will extend.

**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ.A.

In the absence of evidence to shew that there was a surplus in which the separate creditors would be entitled to participate, I do not see how the assignment can be open to objection; but even if that were clearly established, I do not see how the deed could be objected to as being made with intent to prefer—it is made with intent to divide it among the persons entitled to be paid from it. If there should happen to be a surplus, that surplus would be payable to the partner who, upon taking the accounts between themselves, proved to be the creditor. Upon what principle then are the separate creditors entitled to say that that surplus should be divided equally among the separate creditors?

Upon a sale of the separate partner's interest under execution against him, the purchaser would be entitled to file a bill for an account, but it might be found that, so far from having a substantial interest in the assets, the execution debtor was largely indebted to his partner upon the final winding up, and a trust for dividing equally the surplus between the creditors of the two partners might be manifestly unjust.

I should think the proper course for a trustee under such a deed as the present, in the event of a surplus, would be to apply to pay the money into Court; but there is no pretence for saying that it is open to objection as giving a preference.

I think there is nothing in the third reason of appeal.* The provision was a very useless one, but it cannot vitiate the deed. The only discretion which it vests in the trustee is, as to whether, in the event of there being a surplus, he shall, in the case of those claims which do not carry interest as part of the debt, before handing it over to the assignors, allow interest where a jury might have allowed

* 3. The deed of assignment authorizes the assignee to pay the claims with or without interest. If all creditors became party to the deed they would be bound in the discretion of the trustee to accept payment of their claims without interest. Such a deed cannot be said to be for the benefit of creditors; a debtor cannot dictate the terms on which creditors must take his estate: *Andrews v. Stuart*, 6 A. R. 495.

it. If the claims are payable with interest, that is as much part of the claim for which the creditor is entitled to rank as the principal; if not, it is by no means unreasonable to say that the assignors shall not receive the whole surplus if the trustee thinks the creditors fairly entitled to interest.

Whilst I think the claim as to the preference given by reason of some alleged understanding between the sheriff and the assignee untenable; I do not deal with it at length, as it was not urged apparently in the Court below, and is not taken in the reasons of appeal. It can be no objection to the deed, and would come up only upon the trustee passing his accounts; if he paid a sum of money which the trusts do not warrant, a creditor, not privy to the arrangement, might possibly object to the payment in that way.

I think the judgment below correct, and that the appeal should be dismissed.

PATTERSON, J. A.—The contest upon this interpleader issue is respecting some money in the hands of the sheriff of the county of Perth, the surplus of the proceeds of the sale of the stock in trade of a firm of McPherson Brothers, after satisfying two executions.

The defendants are execution creditors of the firm, and the plaintiff is their assignee under a deed of assignment for the benefit of creditors, executed before the defendants' execution reached the hands of the sheriff.

It appears that before the assignment there were two executions in the hands of the sheriff. It does not clearly appear that they were both against the firm. The sheriff, who was a witness at the trial, said that he thought one was joint and one separate, and upon that statement an argument was founded before us, though I believe not in the Court below, as if it proved that only one of the executions was for a partnership debt, and the other for the separate debt of one of the partners.

It is scarcely necessary to say that if anything was to turn upon a fact of that character, very different evidence

ought to have been given to establish it. If it had been mooted in the Court below, we cannot doubt that it would have been cleared up by proper evidence, or by an admission, and we should have had a finding of the fact. As it is, everything is against the existence of the assumed fact. If the sheriff was correct in thinking that one of the executions was against only one of the partners, it would not follow from that circumstance alone that it was for a separate debt and not for a partnership debt. The sheriff evidently understood that the partnership stock in trade was seizable under both executions alike, and it is not to be presumed that he would have thought so if he had been aware that one was for a separate debt. Both partners were examined as witnesses; no question was asked of either of them touching that particular debt, and no one can read their examination respecting their separate liabilities without being convinced that the idea of this being a separate debt of either of the partners had not then arisen.

I may, notwithstanding the absence of foundation in fact, notice by and by the argument to which I refer.

When the sheriff seized under the executions he put the plaintiff in possession as his bailiff, and the plaintiff began to take stock and prepare for the sale.

Then the debtors having decided to make an assignment, it was proposed to assign to the plaintiff, the motive apparently being the convenience of having as assignee the person who already was in actual possession of the goods.

The sheriff consented to the plaintiff accepting the assignment, on the understanding that the priority of his two writs was to be respected.

The assignment was accordingly made to the plaintiff; and the stock being sold in block at so much per cent. of the invoice prices, there happened to be something over after satisfying the two first executions. But in the meantime the defendants' execution had come in, and they dispute the plaintiff's right to receive the surplus as assignee.

Most of the objections are raised upon the terms of the assignment itself, but one or two are outside of the document. One of these is that an intent to prefer some creditor is to be deduced from the arrangement between the sheriff and the plaintiff, that if the latter became assignee, he would hold the goods subject to the two executions. This objection loses its force when, as I have just pointed out, both executions were, so far as we can say, executions upon which the goods were properly seized, and which, therefore, could not be superseded by the assignment; but even if there were not this difficulty, the defendants could not succeed without maintaining that an intent on the part of the grantee, which is not in any way brought home to the grantor, would vitiate a transfer under R. S. O. ch. 118, which is a proposition now advanced, I imagine, for the first time.

Then, in support of an objection to the sufficiency of the description of the goods in the assignment, it was urged in the Court below and in the reasons of appeal, though, I think, not pressed on the argument before us, that the assignment had not been accompanied by an immediate delivery and followed by an actual and continued change of possession.

There was no pretence of fact on which such a contention could rest. The goods were already in the possession of the sheriff before the assignment was made, and never returned to the possession of the debtors.

Let us now consider the objections founded on the deed itself.

It is argued that the terms of it are general enough to convey the personal estate of each of the partners as well as the joint assets; and the trust is to pay the joint creditors only. Assuming, though not deciding this to be so, the deed would in these particulars resemble that which was held void in *Mills v. Kerr*, 32 C. P. 68, 7 A. R. 769, and see *McKitrick v. Haley*, 46 U. C. R. 246.

But we have before us the evidence given at the trial by the debtors. They were examined respecting their separate

property and their separate debts, and the only separate property discovered was a house of one of the brothers, which was mortgaged for an amount which, in his opinion, was as much as it would sell for. Even if the house were an asset of value it would not pass by the assignment, which conveyed personal property only, and, therefore, would not be taken from the separate creditors.

In the absence of separate property to pass under the deed, that instrument could not be vitiated by containing words which would have been sufficient to pass it, if it had existed.

That principle was acted on a long time ago in *McDonald v. McCallum*, 11 Gr. 469, and I am not aware that it has ever been seriously questioned. See *Kerr v. Canadian Bank of Commerce*, 4 O. R. 652.

The objection, as put forward, is not so much addressed to the assumed diversion of separate estate from separate creditors, as to the absence from the deed of any provision for paying separate creditors even if there should be a surplus of the joint estate after paying the joint debts.

The joint creditors only are to be paid, and the trustee is to restore the surplus, if any, to the assignors, either in money or in the state in which it shall happen to be.

A short reference to the statute will shew this objection to be untenable.

We have to keep distinct the two parts of the enactment (R. S. O. ch. 118, sec. 2), the first part which avoids every transfer made with intent to prefer, and the second part which excepts from the operation of the first a deed made for the purpose of paying and satisfying ratably and proportionably, and without preference or priority, all the creditors of the assignor.

It is possible to argue that a deed which directs a trustee to pay one class of creditors and then hand back the residue of the fund does not come within the exception. Such an argument might in some circumstances be hard to answer.

But before we arrive at a discussion of the exception, it

has to appear that the deed offends against the first part of the clause.

We have here a deed which conveys only partnership property, property which neither partner could lawfully apply in payment of his separate debt until every partnership debt was provided for.

The trust to pay the partnership debts out of that property creates no preference. Nor is the necessary effect of the deed to hinder or delay any creditor who could not have taken the property in execution for his separate debt.

Such a deed might doubtless be made use of as a fraudulent means of placing obstacles in the way of a creditor whose remedy was by having the estate wound up and the separate interests of the partners ascertained and realized; and whether or not he could pursue his remedy, even after an assignment, the design to hinder or delay him would vitiate the deed.

We are not dealing with a case in which such actual fraud is suggested; the argument is that the intent to hinder or delay the separate creditors ought to be inferred from the absence of any provision for them.

But it will be observed that, once the charge of preferring one set to another has to be given up, the surplus, if not altogether visionary, will be as accessible when handed over to the debtors as when in the hands of the assignee; and so, with respect to it, the deed creates neither hindrance nor delay, much less renders it necessary to infer that the creation of hindrance or delay was the motive in making it: *Alexander v. Wavell*, 10 A. R. 135.

The only remaining objection is one that evinces some ingenuity. The trustee is to apply the balance, after paying expenses, &c., "in or towards paying and satisfying the just claims of the parties of the third part ratably and proportionably and without preference or priority, * * and after payment in full of the said debts of the debtors, *with or without interest*, to pay the balance which shall then remain over to the said debtors."

The objection is, that a discretion is given arbitrarily to pay interest to one man and refuse it to another, and so an inequality is created.

The clause is one of those very loose ones which seem designed to create litigation. We have read in the earlier part of the deed that the debtors are *involved*, and have *liabilities*, and wish the trustee to pay *just claims*; and now we have the interest on the *said debts* spoken of, the word *debts* occurring here for the first time.

I think we must understand the *said debts* to be the same as the *just claims*. If interest is payable as a *debt*, there is the express trust to pay it as one of the *just claims*. If not payable as a debt, but as damages or *ex gratia*, the clause objected to authorizes the trustee to pay it after the debts are all paid, and thus reduce the resulting balance, a proceeding of which no creditor whose legal debt has been paid in full can complain.

Thus reading the clause strictly it does not interfere with any legal right.

I do not suppose the draftsman framed the clause with that understanding of it, and I would not venture to guess what he did mean. It is sufficient to hold, as I think it was correctly held in the Court below, that the trust to pay all *just claims* ratably is not controlled by this form of declaring the resulting trust; and that it would not be proper to hold that such a discretion is given to the trustee to discriminate between creditors whose legal rights are alike, as to imply an intent to prefer. I refer to the discussion in *Alexander v. Wavell*, and *Kerr v. Canadian Bank of Commerce*.

I think we should dismiss the appeal, with costs.

OSLER, J. A.—Several objections were taken to the assignment founded upon the nature of the trusts and powers reposed in the plaintiff, all of which I regard as overruled by former decisions of this Court, and of the Supreme Court in *Badenach v. Slater*.

The only question is, whether it is necessarily void because no provision is made for the separate creditors.

In *Mills v. Kerr*, 32 C. P. 68, and 7 A. R. 769, the assignment was by partners of their partnership estate and of the separate property of the partners, or one of them, the trust being for payment of the joint creditors only. This was held to be void as giving a preference to the latter over the separate creditors, who could take nothing under the assignment, and being void against them it was equally so against the joint creditors, who might otherwise be deprived by the action of the separate creditors of their recourse against the separate estate, before they could take the benefit of the deed.

In *Kerr v. The Canadian Bank of Commerce*, 4 O. R. 652, the partners made an assignment of their joint and separate assets in trust to pay the debts of the firm only. It was supported against a creditor of the firm on the ground, as I think, that there were in effect no separate creditors in existence who could have objected to it.

The present case differs from both of these. It is an assignment of the property of the firm in trust to pay the debts of the firm. The creditors of the firm are not prevented from enforcing their rights against the separate property by execution in the usual way: and as to that property the separate creditors are on the same footing: while as to the partnership property, it having been found as a fact that the firm was insolvent, there was nothing which they could have reached by an execution against either of its members, the interest of neither being worth anything, even if it should hereafter appear that there is a surplus, the assignment does not prevent them from reaching it in the only way in which they could ever have done so: *Taylor v. Jarvis*, 14 U. C. R. 128, 142; *Bank of Toronto v. Hall*, 6 O. R. 653; *Ovens v. Bull*, 1 A. R. 62.

The deed, therefore, confers no preference upon any creditor or class of creditors, and is not avoided by the Act.

It was urged that the arrangement made by the plaintiff with the sheriff before the execution of the assignment,

to pay the separate execution out of the proceeds of the sale, would invalidate it. I cannot assent to this contention. Even if it was satisfactorily proved—and I do not think it is—that one of the executions was against one of the members of the firm only, yet the effect of the assignment was to pass to the plaintiff all the property of the firm. We can only look at the trusts expressed in it which are to apply the proceeds in payment of the firm's debts only, and we cannot assume that the plaintiff would commit a breach of trust by paying a separate creditor.

I think the appeal should be dismissed.

HAGARTY, C. J. O., concurred.

Appeal dismissed, with costs.

DOUGLAS v. HUTCHISON.

Married woman—Unassigned dower—Separate estate—R. S. O. ch. 125, ss. 3-4—Fi. fa.

The defendant's first husband died in 1870, and she contracted a second marriage in 1871. This action was before the Married Women's Property Act, 1884, was passed.

Held [reversing the judgment of OSLER, J. A., 6 O. R. 581], that the defendant's right to unassigned dower in the lands of her first husband was not separate estate, but was property falling within R. S. O. ch. 125, sec. 3, and she not having the *jus disponendi* without her husband's concurrence her interest was not liable to be sold under execution against her.

Quære, per PATTERSON, J. A., whether a writ of *feri facias* is the appropriate remedy for reaching the separate property of a married woman.

THIS was an appeal by the defendant from the judgment of Osler, J. A., (sitting for a Judge of the Common Pleas Division in Single Court) allowing the plaintiff's appeal from the report of a referee, and dismissing the defendant's motion for judgment on such report.

The action was upon a promissory note made by the defendant for \$400; the defendant, a married woman, pleaded coverture; the plaintiff replied that the defendant had separate estate, and that the note was made in reference to such estate.

The action was tried at Walkerton, before Osler, J. A., who found that the defendant made the note: that she was at the time of the making a married woman: that the plaintiff was entitled to recover out of such separate estate as defendant possessed at the time of making the note; and referred it to the County Judge of Bruce to inquire and report as to a separate estate.

The referee reported his finding that at the time of the making of the note the defendant had no separate estate; and also reported specially as follows:

"That the defendant was married to Andrew Hutchison on the 2nd November, 1871, without a marriage settlement, and has lived with him from that date to the present time: that the said defendant was previously married to one Neil McPhail, who died in 1870, intestate: that the

said McPhail died owner in fee of lot 10, concession 4, of the township of Saugeen, in the county of Bruce: that at the time of her marriage to Andrew Hutchison the defendant was entitled to dower in the said lot: that said dower was never assigned nor set apart, and that the said defendant never sold her said dower, and is now with her said husband living on the said land and working it."

Upon plaintiff's appeal from this report, and defendant's motion for judgment, Osler, J. A., pronounced the order appealed from on the 17th day of October, 1884, (6 O. R. 581).

The appeal was heard on the 8th day of May, 1885.*

W. H. P. Clement, for the appellant.

J. J. Maclaren, for the respondent.

The following authorities were referred to:—*Allen v. Edinburgh Life Assurance Co.*, 25 Gr. 306; *Standard Bank v. Boulton*, 3 A. R. 93; *Moffat v. Grover*, 4 C. P. 402; *Nolan v. Fox*, 15 C. P. 565; *Dingman v. Austin*, 33 U. C. R. 190; *Bell v. Riddell*, 2 O. R. 25; *Kraemer v. Gless*, 10 C. P. 470; *Balsam v. Robinson*, 19 C. P. 263; *Royal Canadian Bank v. Mitchell*, 14 Gr. 412; *Mitchell v. Weir*, 19 Gr. 568; *Redman v. Brownscombe*, 6 P. R. 84; *Emrick v. Sullivan*, 25 U. C. R. 105; *Griffin v. Patterson*, 45 U. C. R. 536; *Wallace v. Hutchison*, 3 O. R. 398; *Miller v. Wiley*, 16 C. P. 529; *Williams v. Reynolds*, 25 Gr. 49; *Boustead v. Whitmore*, 22 Gr. 222; *Field v. McArthur*, 27 C. P. 15; *Lawson v. Laidlaw*, 3 A. R. 77; *Horner v. Kerr*, 6 A. R. 30; *Ingram v. Taylor*, 7 A. R. 216.

September 15, 1885. HAGARTY, C. J. O.—R. S. O. ch. 66, sec. 39, enacts that any estate, right, title, or interest, which under the 5th section of the Act respecting the transfer of real property may be conveyed or assigned to any party, or over which such party has any disposing

**Present*—HAGARTY, C.J.O., BURTON, PATTERSON, J.J.A., and FERGUSON, J.

power, which he may, without the assent of any other person, exercise for his own benefit, shall be liable to seizure and sale under execution against such party, &c., and the sheriff selling the same, may convey and assign the same in the same manner and with the same effect as the party might himself have done.

Turning to R. S. O. ch. 98, sec. 5, we find a contingent, an executory, and a future interest, and a possibility coupled with an interest in any land, whether the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry whether immediate or future, and whether vested or contingent into or upon any land, may be disposed of by deed. But no such disposition shall by force only of this Act defeat or enlarge an estate tail, and any such disposition by a married woman shall be made in conformity with the provisions of the Married Women's Real Estate Act, C. S. U. C. ch. 90, sec. 5.

This section is in sec. 7 declared not to extend to any estate, right, or interest, &c., created before 1st January, 1850, but to extend to and have operation and effect on and from that day.

Defendant's former husband died in 1870, she intermarried with her present husband in 1871. Ch. 127, Revised Statutes, provides for conveyances by married women.

Section 12, provides, that the powers of conveying given by this Act to a married woman, shall not impair or affect any powers which independently of this Act may either by statute, contract, or settlement be vested in or limited or reserved to her, so far as to prevent her from exercising such powers in any case, except so far as by any conveyance under this Act, she may be prevented from so doing, in consequence of such powers having been suspended or extinguished by such conveyance.

Section 2 of ch. 127, declares that "real estate" shall extend to lands, chattels real, rents, and hereditaments, whether corporeal or incorporeal, or to any undivided

share thereof, to any estate, right, or interest therein, whether legal or equitable, to any charge, lien, or incumbrance in, upon, or affecting real estate either at law or in equity, &c.

Section 3 declares that every married woman of age may, by deed, convey her real estate, or convey, &c., any interest therein, and may also by deed bar her dower and any right, or inchoate right of dower in any real estate.

As I understand the decisions, it seems to me that the unsettled real estate of a woman married after the 2nd March, 1872, is to be considered as her separate estate.

The defendant in the case before us had her title to dower consummate on the death of her husband in 1870. While his widow, I think she could have sold or assigned her right to dower under the large words of our statutes, or as pointed out in the judgment of the late Chancellor Blake in *Rose v. Simmerman*, 3 Gr. 598, by the general rules of equity. I also hold that it would be seizable on execution against her; and, as she could have assigned it so long as she was *sui juris*, might legally convey it to a purchaser. (R. S. O., ch. 66, sec. 39 already cited.) But she married again on 2nd November, 1871, prior to the time mentioned in the Act, viz., 2nd March, 1872.

It would therefore seem, that this property of hers falls within the provisions of the Act of 1859, as set out in sec. 3 of ch. 125, R. S. O. She is "to enjoy it free from the debts and obligations of her husband, and free from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried."

It is not designated as her separate estate. She cannot, however, apparently, make title to, or dispose of it except by deed, to which the husband is an executing party, subject to the power of a Judge on proper cause shewn dispensing with his execution thereof.

So far, therefore, as to the sheriff selling and conveying this interest of the married woman, it is not easy to see under the statutes how it can be legally done.

The decision of *Royal Canadian Bank v. Mitchell*, 14

Gr. 412, has been recognized and adopted, apparently in several cases: *Chamberlain v. McDonald*, 14 Gr. 447; *Balsam v. Robinson*, 19 C. P. 263 *Lawson v. Laidlaw*, 3 A. R. 77; *Furness v. Mitchell*, 3 A. R. 510; *Horner v. Kerr*, 6 A. R. 30.

As she could not convey or dispose of real property so held, not stamped with the quality of separate estate, it seems not easy to understand why she could be permitted validly to charge it so that it could be reached by process of the Courts of equity, and sold to meet such charge.

By law the property could not be aliened except by her and her husband executing a deed. For my own part, I think this a most wise provision, coupled as it is with the right in a Judge, on a proper case being made out, to dispense with his joining in the deed.

Her right to deal with her "separate estate" as a *feme sole* is conceded. It is sufficient to say that this property does not fall within the accepted definition of separate estate, and therefore her right to alien or charge can only be exercised as prescribed by statute.

I am, therefore, constrained to hold that the decree below cannot be supported. This view renders it unnecessary to discuss the precise nature of this property. If property of any kind, it must fall under the designation of "real property" and be subject to the usual incidents thereof. I consider that the existing right of a dowress to have her thirds of a specific estate assigned to her for life, as a freehold estate in possession, falls within the very wide words of our statute already cited in this judgment.

I must be clearly understood as deciding this case on the wording of the R. S. O. ch. 125, secs. 3 and 4, and I am not embarrassed by any expressions in the Married Women's Acts of 1872 and 1873, under which such cases as *Boustead v. Whitmore*, 22 Gr. 222, were decided.

The recent Act of 1884, ch. 19, was passed subsequent to the bringing of this action.

BURTON, J. A.—I agree that the appeal ought to be allowed for the reasons given by my brother Patterson. Assuming the right which the married woman had in this case to be “an estate, right, or interest in land,” it is clear that at the time she entered into the engagement upon which the plaintiff relies for resorting to her separate estate, she had no power to dispose of the same by deed, without the concurrence of her husband, and if an express assignment of, it would be clearly void a general engagement cannot be put upon any higher footing.

The case is not, as my Brother has observed, dissimilar in principle from that of property settled to the separate use of a married woman, without power of anticipation, in the form usually to be found in properly drawn marriage settlements. The express terms of the trusts are, that she shall have no power while under coverture to dispose of the property by way of anticipation. It would be rather a startling proposition that, although she could not anticipate by an express charge on the property, yet she could dispose of it by way of anticipation by contracting during the coverture a debt not directly charging the property, but giving the creditor the right to claim it.

The law as it then stood protected the property by withholding from the wife the power to convey without the concurrence of the husband. It has since that time, wisely or unwisely, it is not for us to say, been altered so as to leave to the wife the entire control and disposition of her property, but in the case we are dealing with she had no such power, and I am of opinion, therefore, that the Court below came to an erroneous conclusion in holding the property to be separate estate in respect of which the engagement of the wife would bind, and that the appeal should be allowed.

PATTERSON, J. A.—The order which is the subject of this appeal declares in effect, though not in very accurate terms, that the defendant's right of dower in the lands of her former husband is her separate property, and is liable

to be sold to satisfy the claim, and it authorizes the issue of execution for the sale of her right to the unassigned dower.

The broad question with which we have to deal is the liability of this asset to satisfy the plaintiff's claim. The finding of the learned Judge at the trial was, that the plaintiff is entitled to recover against the defendant, out of such separate estate as she possessed at the time of the making of the note, the amount of the note and interest. We are not, of necessity, required to say whether a *fi. fa.* is the appropriate remedy for reaching the separate property of a married woman, or whether that process can properly be awarded. See *Field v. McArthur*, 27 C. P. 15; *Picard v. Hine*, L. R. 5 Ch. 274; *Lawson v. Laidlaw*, 3 A. R. 77; *Pike v. Fitzgibbon*, 17 Ch. D. 454.

In the case of *Allen v. Edinburgh Life Ass. Co.*, to which my brother Osler referred in the judgment now in review, an attempt had been made to sell, on an execution obtained against husband and wife for the costs of a defence in which they had failed, the wife's inchoate right of dower in the land of her living husband. The decision of Spragge, C., granting an injunction to restrain the attempted sale is reported 19 Gr. 248. After the death of the husband, and after the passing of the Act 40 Vict. ch. 80 (O.), under which any interest in land over which an execution debtor has any disposing power which he can exercise for his own benefit, without the assent of any other person is liable to seizure and sale under execution, it was held by Proudfoot, V. C., as reported 25 Gr. 306, that the widow's unassigned dower was saleable, and he dissolved the injunction.

I have no doubt of the correctness of that decision, while I agree with the learned Vice-Chancellor that the injunction was proper in the circumstances under which the case was before Spragge, C. These decisions, however, do not touch the present question, the owner of the unassigned dower in this case being a married woman.

The rule settled by the earlier decisions under our Married Women's Act of 1859, and too uniformly acted

on to be now questioned, requires the *jus disponendi* in the married woman before her property, which, as in this case, is governed only by the provisions of the Act of 1859, can be held to be separate property of the kind which she can charge by her general undertaking.

The changes in the law respecting the conveyance by married women of their real estate had not, up to the date of the transactions now in question, gone so far as to confer the *jus disponendi* without the concurrence of the husband. R. S. O. ch. 127.

The only doubt which I have felt as to the right of unassigned dower, or any life estate of the wife, coming within the rule, arose from the circumstance that while the Act of 1859 did not deprive the husband of all interest in his wife's land, inasmuch as it left his curtesy untouched, he was absolutely deprived of all legal interest in land which she held only for her own life, and in which, therefore, there could be no curtesy.

But it is clear that she was not, until more recent legislation than that found in R. S. O. ch. 127, enabled to convey even her life estate, without her husband being a party to and executing a deed, unless in the exceptional cases provided for in the Act.

I infer from the provision made in sec. 4 for those exceptional cases, that the restraint upon the wife's *jus disponendi*, by requiring the husband to join in every conveyance by the wife of "any estate, right, or interest in land, whether legal or equitable," was imposed for the protection of the wife, and that so the policy as well as the letter of the law applies as well to a life interest as to an estate in fee.

The withholding of the absolute power to convey resembles in principle the restraint upon anticipation in a settlement. In *Pike v. Fitzgibbon*, 17 Ch. D. 454, several of the arguments on which the Lords Justices held the property there in question not liable, might, *mutatis mutandis*, be applied to the case before us. Thus Cotton, L. J., speaking of some particulars in which the position of a married woman

with separate property differed from that of a *feme sole*, said (p. 464): "She is regarded as a *feme sole* only as regards property which, under the trust, she is entitled to deal with as if she were a *feme sole*, but as regards property which she is restrained from anticipating, she is not, as regards persons other than her husband, in the position of a *feme sole*. As regards her husband, no doubt she is, as regards property settled to her separate use (whether there is a restraint upon anticipation or not), treated as a *feme sole*, that is to say, she, and not her husband, is the person who alone can receive and give a discharge for the money, and her husband is absolutely excluded; but as regards the outside world she is not regarded as a *feme sole* in respect of property subject to a restraint upon anticipation."

Our statute 40 Vict. ch. 8, the 37th section of which is now R. S. O. ch. 66, sec. 39, which makes interests in land, not in possession, exigible in execution when the debtor has a disposing power over them which he may, without the assent of any other person, exercise for his own benefit, while it may not come directly into operation in this case, if it is correct to hold, as I think it is, that the remedy by *fi. fa.* is not one of which the plaintiff could avail himself (a), may nevertheless be usefully referred to as placing the liability to execution upon the same basis as the liability of a married woman's property for her general engagements, namely, upon the *jus disponendi*.

I am of the opinion that we should allow the appeal.

FERGUSON, J.—I concur in the conclusions of the learned Chief Justice.

Appeal allowed, with costs.

(a) See, however, *Beemer v. Oliver*, 10 A. R. 656, 661, per OSLER, J.A.

WHITING V. HOVEY.

*Interpleader issue—Judgment at trial—Interlocutory order—Appeal—
Divisional Court—Action—Secs. 35 and 37, Rule 510, O. J. A.*

A motion to quash an appeal to this Court from the judgment of FERGUSON, J., (9 O. R. 314), upon the trial of an interpleader issue, upon the ground that the decision was interlocutory, and not appealable under sec. 35, O. J. A., was dismissed without costs, the members of the Court being divided in opinion.

Per HAGARTY, C. J. O., and OSLER, J. A.—The decision in question was an interlocutory order within the meaning of sec. 35, O. J. Act, and one from which there would have been no relief before the passing of the O. J. Act by a direct appeal to this Court; and sec. 35 precludes such an appeal under the O. J. Act, though there is the right to have the order reheard by a Divisional Court, and an appeal lies from the order on rehearing, which is not less interlocutory than the order at the trial, because an appeal lay in such case before the O. J. Act.

Per BURTON and PATTERSON, JJ. A.—The decision is a final adjudication on the question of property, and is only interlocutory in the sense of being a step in the interpleader proceedings which, as a whole, are interlocutory with relation to the original action. But an appeal lay before the Judicature Act from the decision of an interpleader issue notwithstanding its interlocutory character. Therefore, this decision being the decision of a Judge in Court is appealable under sec. 37 and is not within the restriction of sec. 35.

Per Curiam.—Rule 510 does not give a right of appeal from the decision in question, for it is in terms limited to the trial of *actions*, and cannot be extended to the trial of interpleader issues.

Quære, *per* PATTERSON, J. A., whether the term “interlocutory” in section 35 is not used in the same sense as in 45 Vict. ch. 6, sec. 4 (O.) as denoting the character of the decision, and not the stage at which it is pronounced.

McAndrew v. Barker, 7 Ch. D. 701, discussed.

THE plaintiff in an interpleader issue, tried by Ferguson, J., and decided in favor of the defendant, lodged an appeal from the judgment at the trial to this Court.

The respondent on the 15th of September, 1885, moved to quash the appeal upon the ground that no appeal lay from such judgment.*

The facts and arguments appear in the judgments.

Robinson, Q.C., and *W. M. Hall*, for the motion.

McMichael, Q.C., contra.

October 13, 1885. BURTON, J. A.—In the case of *McAndrew v. Barker*, 7 Ch. D. 701, in which the Court of Appeal in England held the appeal too late, it being held that

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the order appealed against was an interlocutory order within the meaning of the rule requiring it to be taken to a hearing within twenty-one days, much stress was laid upon the inconvenience and delay which would result from its being held to be a final order, entitling the unsuccessful party to it to delay any appeal for a year, and thus staying the hands of the Court of first instance as regards the original actions, for the whole of such period.

Here the complaint is, not that the parties are not proceeding promptly with their appeal, but rather that they are improperly attempting to expedite their appeal: that they should have first gone to the Divisional Court and tried their fate there, it being conceded that there is nothing to prevent the appellant, if unsuccessful there, coming to this Court.

I think, unless the language clearly compels us to hold that the appeal can only be brought here in that circuitous manner, and with so much unnecessary delay, we should struggle against such a construction.

Section 37 clearly gives a right to appeal direct to this Court against any order or decision of a Judge in Court, unless it comes within the exception or prohibition contained in section 35.

Now, as I read that section, I take it to mean nothing more than this: there shall be no appeal to a Divisional Court from an interlocutory order unless before the passing of the Act, there would have been an appeal to the Full Court, and there shall be no appeal to the Court of Appeal in such a case, in case before the passing of the Act there would have been no appeal to the Court of Appeal.

If, therefore, before the passing of the Act the decision of the Full Court would have been final, and no further appeal allowed, neither will it now be allowed, and if there would have been no further appeal from the Full Court, a party cannot now appeal direct to the Court of Appeal.

If, however, as the law stood, a party could obtain relief against an order of a Judge in Court of which he complained

in the Court of Appeal, although it might be necessary for him to go through the intermediate Court before he could obtain that result, I do not see that the restriction in section 35 at all interferes with his right under section 37. On the contrary, I should say that, having regard to the circumstances referred to in *McAndrew v. Barker*, it was intended to give parties complaining of such an order as the present, the right to go direct to the Court of Appeal, instead of adopting the circuitous mode which was formerly necessary.

I think we can so hold quite consistently with section 35, and that the motion, therefore, to strike out the appeal fails and should be discharged, with costs.

PATTERSON, J. A.—The interpleader order was made in an action of *Hovey v. The Farm and Dairy Utensil Manufacturing Co., (Limited) and others*, and directed that the question of the title to goods seized under execution upon Hovey's judgment in that action, should be tried at the sittings at Toronto for the trial of actions in the Chancery Division of the High Court of Justice.

The issue was accordingly tried at that sitting by Mr. Justice Ferguson, who decided in favour of Hovey, the execution plaintiff, but the defendant in the issue.

The plaintiffs in the issue desire to appeal from that decision to this Court, and the defendant has moved to quash the appeal, contending that no appeal lies to this Court from the decision of an interpleader issue by the Judge who tries it, but only from the judgment of a Divisional Court.

I do not think the objection well founded.

The 37th section of the Judicature Act enacts that, "Save as aforesaid, and subject to the other provisions of this Act, any rule, order, or decision of a Judge in Court may be appealed against to the Court of Appeal."

The decision in question is clearly the decision of a Judge in Court, and is, therefore, within the direct terms of this section, unless something "aforesaid" excludes it.

The argument is that it is excluded by section 35, which

declares, amongst other things, that "there shall be no appeal to the Court of Appeal from an interlocutory order in case before the passing of this Act there would have been no relief from a like order by an appeal to the Court of Appeal."

Our section 35 is not the equivalent of any provision in the English Judicature Act; but amongst the rules of 1875 under that Act was one which was not adopted by us, limiting to twenty-one days the time for appealing against interlocutory orders, unless by special leave of the Court the time was extended.

It is urged, on the authority of the English decisions under the English rule, that the decision now in question is an interlocutory order within the meaning of our section 35.

If, for the moment and for argument's sake, we accede to that contention, it is still necessary, in order to support the objection, to maintain that before the passing of the Act there would have been no relief from a like order by an appeal to the Court of Appeal.

This has been attempted by pointing out that, while it was established by *Wilson v. Kerr*, 18 U. C. R. 470, following the express decision of *Withers v. Parker*, 4 H. & N. 810, that the adjudication of the question of title upon an interpleader issue was appealable, those decisions related to appeals from Courts sitting *in banc*.

I question the soundness of the suggested distinction.

Formerly the issue was, in the ordinary course, usually tried at *Nisi Prius*, a Court from which no direct appeal lay, but whose decisions were reviewed by the Court which directed the issue, on motion for a new trial or on leave reserved, and from that Court an appeal lay. The intermediate step between the Court of *Nisi Prius* and the Court of Appeal was due to the accident of the constitution of the Courts, but the question tried upon the issue came at last before the Court of Appeal. Under our present system the Judge who tries the issue, while he may be discharging functions like those which belonged

to the Court of *Nisi Prius*, is holding a sitting of the High Court.

If I correctly understand the English decisions relied on, they proceeded on the ground that an interpleader issue under the statute was, in relation to the original action, an interlocutory proceeding. As remarked by Thesiger, L. J., in *McAndrew v. Barker*, 7 Ch. D. at p. 704 : "The determination upon the issue was a condition precedent to the final determination of the actions, and that fact demonstrates the inconvenience and delay which would result from its being held that the order determining the issue is a final order, entitling the unsuccessful party to it to delay any appeal for a year, and thus staying the hands of the Court of first instance as regards the original actions for the whole of such period, or putting the parties to the expense of a final order in the actions, which would require to be set aside if the order upon the interpleader issue turned out to be wrong."

Thus the whole interpleader proceeding being held to be interlocutory, every step in it was necessarily, in the same sense, interlocutory. The order directing the issue, the trial of the issue, and the judgment of the Court *in banc* or the Divisional Court affirming or setting aside the verdict or judgment given at the trial, were all so many steps in an interlocutory proceeding, and each was itself interlocutory.

The position of the interpleader issue in that respect is not different now from what it was before the Judicature Act, when it is clear that its interlocutory character did not stand in the way of an appeal.

Thus it follows that, without disputing the applicability of the English decisions under Order lviii. r. 15 of the Supreme Court Rules of 1875 to section 35 of our Judicature Act, this case remains within the general terms of section 37, and is appealable.

A good deal of the argument in support of the motion to quash the appeal was directed to shew that Rule 510, which declares that, when at or after the trial of an action before a Judge, the Judge has directed that any judgment

be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that the judgment so directed is wrong, and that such application may be to a Divisional Court of the High Court or to the Court of Appeal, did not apply to interpleader issues, because they are not actions.

The close reading of the rule which confines its operation to actions as defined in section 91 of the Judicature Act, is supported by English decisions which have been cited to us; and the result of that reading is that, inasmuch as the rule does not apply to interpleader issues, it cannot qualify the wide effect of section 37, so far as that section applies to any decision of a Judge in Court upon an interpleader issue. Where the rule does apply, its effect would seem to be to give a right to go to a Divisional Court before, or in place of, coming to the Court of Appeal, but not to cut off any existing right to resort in the first instance to this Court.

It is possible that in some form or other the question of the force which ought to be given to the word "interlocutory" in section 35 may have to be decided. There is nothing in the present decision to preclude the consideration of that question when it arises; and I desire not to be understood to concede that we are necessarily governed by the construction put upon the same word as used in the English rule of 1875, Order lviii. r. 15, in such cases as *Cummins v. Herron*, 4 Ch. D. 787, and *McAndrew v. Barker*, 7 Ch. D. 701.

Interpleader proceedings are clearly collateral to the original action, and they may, without violence to language, be treated as within the scope of a rule the object of which is to prevent delay in reaching the final determination in an action, by requiring appeals from interlocutory decisions to be prosecuted with promptitude, but which is not intended otherwise to interfere with or limit the right of appeal.

The right to appeal to this Court from a final judgment ordered at the trial of an action is doubtless given by section 37, and does not depend on Rule 510; the rule adds the privilege of going first to the Divisional Court. But if that rule was necessary to enable a party to an action proper to move in the Divisional Court, where have we any warrant for a party to an interpleader issue moving in that Court against the judgment of the Court pronounced at the trial? I do not find it in any direct provision of either the statute or the rules. My strong impression is that the success of the present contention of the applicant involves the exclusion of the parties to an interpleader issue from any means of reviewing the adjudication of the Judge who tries the issue; but if, as contended, the Court of Appeal can be reached only through the Divisional Court, and if, by any treatment of the statute or the rules, a way to the Divisional Court can be found, we have this anomaly, that a proceeding which is called interlocutory must consume time and involve expense, before final decision by this Court, that may be saved when a final judgment is in question.

We may well hesitate before attributing such an intention to the Legislature.

The word "interlocutory" though most frequently employed to designate steps in an action intermediate between the initial and final proceeding, and merely leading towards the proceeding which finally terminates the litigation, is not inaptly used in contradistinction to the word "final" with reference to the actual adjudication of the substantial matter in dispute. Between the parties to an interpleader issue, the judgment at the trial is a final adjudication upon the title to the property, which is the whole matter in controversy between those parties, notwithstanding that one of them, who is a party to the original action, may have something more to settle in that action with another party who is no party to the interpleader.

The purpose of the English rule being to prevent delay in the final disposition of all questions in the original action,

both cases the former English practice, which still prevails with us, is referred to, and the interlocutory nature of the order at the trial noticed.

The interlocutory order now in question, therefore, being one from which there would have been no relief before the passing of the Judicature Act, by a direct appeal to the Court of Appeal, section 35 appears to preclude such an appeal from it under that Act, though it is equally clear that it is an interlocutory order which may be reheard by a Divisional Court; and that there is an ultimate right of appeal from the order of that Court on the rehearing; since that order, though not less interlocutory than the order at the trial. (*Highton v. Treherne*, 39 L. T. N. S. 411; *Wilks v. Judge*, W. N. 1880, p. 98,) is one from which an appeal lay to the Court of Appeal before the Act.

The appellants urge that they have the right to appeal direct to the Court under Rule 510 or 317 (a), *Maclean* p. 430, [which provides that where at the trial of an action before a Judge, the Judge has directed that any judgment be entered, any party may, without any leave reserved, apply, either to a Divisional Court of the High Court or to the Court of Appeal, to set aside such judgment.] This rule, however, as it now exists, and as it was originally framed, is in terms limited to the trial of *actions*, and cannot be extended to the trial of an interpleader issue. That this is so appears, I think, from *Hamlyn v. Betteley*, 6 Q. B. D., (C. A.) 63 (1880), where it was held that Order xxxvi. rr. 2 and 3, which provide that *actions* shall be tried before a Judge or before a Judge and jury, and that the plaintiff may specify the mode of trial, did not apply to the trial of an interpleader issue so as to entitle the plaintiff to have it tried without a jury. Lord Selborne, delivering the judgment of the Court, said that the interpleader proceeding there in question, the same as that now before us, was strictly statutory, and that Order 1 r. 2, the same as our r. 2, must be taken to mean, that, if no provision be made to the contrary, the practice in interpleader was to retain all the incidents it had before the Judicature Act,

one of which was (in England) the right of trial by jury. He held that no provision had been made to the contrary so as to give either party a right to vary the mode of trial "Order xxxvi., rule 3, relates to quite a different thing, its words plainly referring to an action properly so called, and not including interpleader, which is not an action either in the strict or any conventional sense. Section 100 (O. J. A. sec. 91) defines an action as 'a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court.' I find no rule of Court prescribing the commencement of interpleader proceedings in any other manner. On the contrary, interpleader is treated by Order 1, rule 2 (O. J. A. rule 2) as a proceeding in an action, and not as an action itself."

I do not think we are at liberty to give the word "action" a wider meaning where it occurs in our rule than it received where the point was expressly raised upon the meaning of the same word in the English Rule: *Witt v. Parker, supra*, decided in 1877, seems distinguishable.

The only question there was, whether since the Judicature Acts an appeal lay to the Court of Appeal at all in an interpleader issue, and it seems to have been held, for the case is not very clearly reported in either of the reports, that as an appeal lay before the Act, sec. 19, which corresponds to secs. 13 and 37 of ours, but without the restriction as to interlocutory orders, gave an appeal.

One of the learned Judges, Brett, L. J., refers to Order 40, r. 4 (in effect the same as our rule 510, but which requires the application in the case provided for to be made to the Court of Appeal only) as applicable, but the case does not seem from anything which was said by the other members of the Court, to have turned upon that, and Bramwell, L. J., expressly puts the right of appeal upon section 19, the language of which is clearly wide enough to confer it.

In view, therefore, of the later decision of *Hamlyn v. Betteley* and of the express restriction contained in section 35, I think we cannot treat *Witt v. Parker*, in which, it

is to be observed, the point decided in *Hamlyn v. Betteley* was not raised, as governing the present case.

Williams v. Mercier, 9 Q. B. D., C. A. 337 (1882) appears to me to support this conclusion. There it was held that Order 40 r. 10 (the same as our Rule 321) applied to every application for a new trial. The Master of the Rolls says: "There is no exception of interpleader proceedings. It is true that by Order 1 r. 2, the old practice of interpleader is continued, but there are no negative words in Order xl., r. 10 to exclude the new powers of the Court of Appeal in carrying out that practice."

Rule 4 of Order 40, (Rules 510, 317a) is on the other hand expressly limited to the case of the trial of an *action*, a word which by the interpretation clause of the Act has a defined and exclusive meaning.

See also *Re Turner v. The Imperial Bank*, 9 P. R. 19; *Coulson v. Spiers*, *Ib.* 491; *Cole v. Campbell*, *Ib.*, 498; *Re Galerno and Rochester*, 46 U. C. R. 379; *Hartmont v. Foster*, 8 Q. B. D. 82; *Dodds v. Shepherd*, 1 Ex. D. 75.

HAGARTY, C.J.O., concurred in the judgment of OSLER, J. A.

In the result, the motion to quash the appeal was dismissed, without costs.

FEATHERSTONE V. VANALLEN.

Payment in advance—Failure of consideration—Contract—Claim—Settlement—Release—Inquiry

The defendant, having delivered ties to a railway company in excess of his contract, as he alleged, arranged that such ties should be returned as received by the company on a contract with the plaintiff. In anticipation of such returns, and of payment therefor, the plaintiff paid the defendant \$1,000, and brought this action to recover the same, alleging that he never was able to procure returns or payment from the railway company, and that the consideration for the \$1,000 had therefore failed. It was shewn in evidence that the plaintiff had, in a claim against the railway company for 19,883 ties, included 3,260 delivered by the defendant, and that, the railway company disputing such claim, a settlement had been effected, the plaintiff accepting \$1,000 in full of his claim, and giving the company a formal release of all demands.

Held, that, to the extent to which the ties were delivered by the defendant on plaintiff's account, the latter could not, in view of the circumstances, allege failure of consideration: but that he was not bound by the settlement to pay for ties that were not delivered, and therefore that the determination of the action depended upon the result of the inquiry directed as to the number of ties delivered by defendant: and an appeal from the judgment directing such inquiry was accordingly dismissed.

The objection, that the Judge at the trial should have himself decided the issue as to failure of consideration, instead of directing an inquiry before the Master, is not one that the Court will entertain.

AN appeal by the defendant from the judgment of Proudfoot, J., pronounced at the trial of the action at Chatham, on the 27th of April, 1883.

The facts sufficiently appear from the judgment delivered in this Court.

The appeal was heard on the 10th of June, 1884.*

Robinson, Q. C., and W. Cassels, Q. C., for the appellants.
Moss, Q. C., for the respondent.

June 30, 1884. The judgment of the Court was delivered by PATTERSON, J.A.—This action may be shortly described as an action to recover \$1,000, which the plaintiff alleges he paid to the use of the defendant upon a consideration which failed.

The defendant had delivered ties, or he so alleged, to the Great Western Railway Company, in excess of a contract

**Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and MORRISON, J.J.A.

which he had. Thereupon it was arranged that the ties should be returned by the inspector as received on a contract of the plaintiff, and that the plaintiff should receive payment for them from the railway company, and account to the defendant. In anticipation of the returns and payment being so made, the plaintiff or his partners gave the defendant a promissory note for \$1,000, which the plaintiff ultimately paid. This is the money he now seeks to recover back on the ground that he never was able to procure the returns of the ties or to get payment for them.

The decree from which the defendant appeals refers the action to the Master to take an account of the number of ties delivered by the defendant to the Great Western Railway Company, on account of the plaintiff's contract, reserving further directions and costs.

One objection made is, that the learned Judge should have himself decided whether or not the consideration for the payment had failed, as that was the issue on which the plaintiff's action had to stand or fall.

That seems to us to be a matter of practice with which we are not, in this instance, called to interfere. The account may shew a partial failure of consideration, or a total failure, or that the ties were all delivered. If the disposal of the issue properly depends on that question of account, it will be dealt with on further directions. We could only interfere by sending the matter back for the Judge to do what he has referred to the Master, and whatever we may think of the comparative advantages, on the score of convenience, or expense, or otherwise, of the two modes of trial, we are not prepared to say that the decision arrived at is one for us to criticise.

But the defendant has raised before us another point, and one which, as far as we can perceive, was not made in the Court below. It is shewn in evidence that the plaintiff rendered a statement to the railway company shewing as the result of a considerable number of transactions a balance of 19,883 ties, which he claimed payment for from the company. This number included 3,260, which were

noted in the statement as "delivered by D. R. VanAllen & Co., previous to my contract and was to be transferred to it."

The company disputed the claim, and the plaintiff compromised by accepting, in full of all claims and demands, \$1,000, which was only a small proportion of what the 19,883 ties would have come to.

This settlement was carried into effect by a release executed by the plaintiff, in which document it was recited that he claimed to have delivered or procured to be delivered as many as 19,883 ties of which he alleged that the tie inspector had not taken an account, or for which the company had not paid him: that the company denied these allegations, and maintained that they had paid him for all the ties he had delivered or procured to be delivered: and that for the sake of peace, and a settlement of the matters, and of all claims and demands of the plaintiff of any kind or nature against the company, it was agreed that the company should pay and the plaintiff accept \$1,000 in full payment of all ties alleged to have been delivered as aforesaid, and in full satisfaction of all demands: then followed the general release.

The defendant's contention is, that the plaintiff, having had power to receive payment from the company for his ties, and having claimed for them in this account, and having accepted the \$1,000 and given the release, cannot now say that he has not received payment for the ties.

We agree that if the defendant's ties were delivered to the railway company on account of the plaintiff's contract, the plaintiff has by this settlement with the company precluded himself from disputing the defendant's right to payment for them; or, in other words, that to the extent to which such ties were delivered he cannot now allege failure of consideration for the money he now sues for. But we cannot see sufficient grounds for holding him bound by his settlement to pay for ties that were not delivered.

We therefore think the determination must depend on the result of the inquiry before the Master.

This conclusion, which we arrive at after hearing the very able argument of counsel for the defendant touching the further effect claimed by them for the deed of release, is the same as that acted upon in the Court below.

The contest there seems to have been altogether as to the delivery of the ties. Nor was any issue respecting the effect now sought to be attributed to the deed or the settlement presented by the defendant's statement of defence, the allegation there being that the "inspector did return on the plaintiff's account a large proportion of the said ties, and the plaintiff received payment therefor from said railway company."

We are of opinion that the appeal should be dismissed, with costs.

Appeal dismissed, with costs.

LONG ET AL. V. HANCOCK.

Insolvent debtor—Fraudulent preference—R. S. O. ch. 118.

The plaintiffs having a claim against the Hamilton Knitting Company, pressed the company for payment of their demand or security therefor. All parties were conscious that the company was insolvent and could not carry on their business, but would have to make an assignment unless they obtained an extension of credit from the plaintiffs, on getting which their manager stated that "he could carry the concern along." On the suggestion of one of the plaintiffs, the company agreed to give a mortgage on their works, &c., but as it was the opinion of all that the company could not give a mortgage to secure a pre-existing debt, it was arranged that a simulated loan should be effected by the plaintiffs to the company, nearly the whole of which should be applied to the payment of the plaintiffs' claim; and such an arrangement was carried out accordingly. On a proceeding instituted to impeach this mortgage, BOYD, C., held the transaction a fraudulent preference under R. S. O. ch. 118, (7 O. R. 154) and an appeal from that judgment, owing to an equal division of the Judges in this Court, was dismissed with costs.*

THIS was an appeal by the plaintiffs from the judgment of BOYD, C., declaring the mortgage in favour of the plaintiffs by the Hamilton Knitting Company securing the sum of \$5,000, was a fraudulent preference of the plaintiffs under the circumstances appearing in the case, and which are fully stated in the report in the Court below and in the present judgments.

The appeal came to be heard before this Court, on the 2nd day of December, 1884.†

Crerar, for the appellants.

E. Martin, Q. C., and *Furlong*, for respondents HANCOCK & CO.

A. D. Cameron, for respondent FAIRGRIEVE.

The authorities cited are mentioned in the former report and in the present judgments.

January 13, 1885. HAGARTY, C. J. O.—The learned Chancellor found on the evidence before him, that "the proper conclusion from the facts of this case is that there

* This was reversed by the Supreme Court, November 16th, 1885.

†Present.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.
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was no *bond fide* pressure which induced the giving of this security, but that it was by the device of a moribund company to prefer the plaintiffs to the other creditors, as all parties very well knew and designed."

In the view I take, it is not necessary to treat the matter in any other light than that of an ordinary chattel mortgage to secure a debt.

The company was, as I understand the evidence, hopelessly insolvent when this security was obtained. It was no doubt obtained at the pressing instance of the appellants, fully aware, I think, of the inability of the company to meet its engagements, and most anxious to secure all they could from the anticipated wreck. I do not care further to consider the application of the doctrine of "pressure."

Except the statement of Mr. Sweet, the manager, that he told Mr. Parkes as he believed, that in the terms of credit given by this mortgage "he could carry the concern along," we have nothing to suggest a natural belief that failure must have resulted from the state of affairs found to exist.

Mr. Parkes the president states that he said unless Sweet thought he could carry on the concern they had better make a general assignment for creditors.

Long, one of the appellants, admits that in answer to the first terms proposed Sweet said he could carry it out. Long then agreed to the terms of credit in the mortgage, and Sweet said he could carry that, and Parkes said he would recommend the directors to give security, and Parkes said to Sweet if he could not pull it through why he had better make an assignment.

It was also admitted by Long that before the mortgage was given he was asked by Sweet if he would consent to assign the mortgage to whom the directors might ask him so to do, and he consented.

Mr. Parkes explains this at p. 15 by stating that "in the event of trouble arising under the mortgage, we thought at that time it would not be a bad position to occupy that we should have the opportunity of stepping forward and

taking their position if we found, after an examination of the affairs of the company, that the company could be carried on."

He adds that it was no part of the arrangement under which the mortgage was given.

On the same day as the mortgage was given, the mortgagees signed an instrument giving Parkes, Ambrose & Shambroke an assignment of this mortgage in payment.

Mr. Parkes says that his own hopes of the concern paying were not very strong. He knew that 50 per cent. of the capital was gone.

The mortgage was given on May 5th. On June 26th following, a resolution to wind up was passed by the directors. Their manufactured goods, as I understand, were pledged to the bank for advances, leaving say \$2,000 of "margins," which afterwards disappeared on realization.

Sweet states that if it had become known on 5th May that they had given this mortgage, it would have impaired their credit already bad, and that Mr. Parkes had a lien on the margins.

Parkes states that he had no doubt but that the knowledge of this chattel mortgage being given would completely deprive them of the possibility of getting credit outside.

This case presents the strong feature not to be found in many others, viz., the complete knowledge of the creditors who press for and obtain security of the desperate state of their debtors' affairs. They are also aware of the alternative put to them if they do not give more extended terms of credit, viz., that the debtors must make a general assignment.

We cannot, but notice the different aspect of a case like this, from that of many other cases in which a creditor insists on either obtaining security or resorting to legal proceedings without any special knowledge of the state of his debtor's affairs, beyond his own disinclination to give further credit.

I do not propose to discuss the well known doctrine of

pressure. It seems to me to be useless to educe any hard and fast rule from the contradictory mass of cases and *dicta* on this subject.

As a general rule the main if not the only importance of "pressure" seems to be to rebut the idea that the debtor voluntarily selects a particular creditor to secure in preference to others. I think there is enough in the case before us to shew that the creditor was pressing for security and threatening a resort to legal proceedings.

But I am strongly of opinion that the verdict of a reasonably intelligent jury, or the finding of a learned and experienced Judge that the debtors here, being in utterly hopeless insolvency, did, in the language of our statute, make an assignment of their chattels &c., with intent to defeat or delay their creditors, or with intent to give one or more of their creditors a preference over their other creditors, ought not to be set aside as either unwarranted by the evidence or as clearly against the weight of evidence.

I cannot conceive a much stronger case than the present against the security given, or one that calls more pointedly for a careful application of the wholesome provisions of our statute.

If this assignment be upheld, it can only be on the opinion of the manager Mr. Sweet, that the business could as he thought be "pulled through" if Long & Bisby gives the required terms of credit.

Most persons reading the evidence would perhaps come to the opinion that such a hope on the manager's part was almost visionary. Amongst that number was probably the learned Chancellor who tried the case.

I am not prepared to say that the decision he arrived at was wrong, that this mortgage was and is void against the general creditors

In this view of the case I need not discuss the Chancellor's opinion that the company could not give a mortgage to secure a past debt. I am not at present prepared to accede to that view.

If it were necessary to discuss the case further, I have no doubt but that much could be said as to the mortgage placed on the registry representing a transaction having no substantial reality, [but merely an unreal device to meet a supposed legal difficulty.

I think the appeal should be dismissed.

BURTON, J. A.—If there had been a conflict of evidence in this case, I should have felt it impossible to interfere with the conclusion of the learned Chancellor upon the question of fact as to the nature of the pressure and the motive of the debtors in making their mortgage under which the plaintiffs claim, but I do not find any conflict of evidence, and as the learned Judge appears to have been in some degree influenced by the view he took of the mode adopted by the parties in order to carry out the arrangement they had arrived at, as to extending the time for payment, and giving security for the debt, the payment of which was thus deferred, which he describes “as the device of a moribund company to prefer the plaintiffs to the other creditors, as all parties very well knew and designed,” I have been compelled to consider the case upon its merits without reference to the finding of the learned Judge.

All parties at the time this demand was made were, rightly or wrongly, under the impression that they could not give a mortgage for a past debt, and they therefore openly and without any fraudulent design resorted to a mode of doing so by means of an advance out of which the debt was to be paid.

It is clear that the company did not intend to do any thing that was illegal; they were advised that the original plan of giving the proposed security was illegal, and they determined to carry out the object they had in view in a legal way. If the whole thing had been a fraud and a sham it would have been different, but assuming for the moment that if they had the power to give a mortgage to secure a past debt which would not have been open to

objection as a fraudulent preference, the security given here in order to carry out the original intention (when they were advised of the difficulty of carrying it out in that way) must be equally unobjectionable if the provisions of the Chattel Mortgage Act have been complied with.

I think the mortgage is not open to objection on this ground, but it cannot stand on any higher ground than a chattel mortgage for the debt itself would have stood, and if that mortgage would have been void as a fraud upon the Act so will this be.

I do not think that the proper inference to be drawn from the evidence is that the mortgage was given with the intent to give these plaintiffs a preference, and I do not wish by my silence to appear to acquiesce in the view expressed by the learned Chief Justice that the case differs from many which are to be found in the books by reason of the creditor's knowledge of the state of his debtor's affairs. What I always understood to be the law was that however desperate the circumstances of a debtor were, and although the creditor knew them to be desperate, the creditor was not debarred from pressing his debtor for payment, and if he did so press, and payment was made or security given such payment or security was not a fraudulent preference.

I have no doubt that under a bankruptcy law the assignment in this case might have been treated as an act of bankruptcy; and if bankruptcy had followed upon it, it might have been avoided wholly irrespective of any fraud; but that affords no test of its invalidity in this case. In *Jones v. Harber*, L. R. 6 Q. B. 77, it was contended that as the assignment there was an act of bankruptcy, it must be by operation of law fraudulent, and if fraudulent at all against the assignees it must be voidable at their option; but it was held there that as the bankruptcy was on the bankrupt's own petition, and there was therefore no relation back, the assignees could not impeach the transaction unless they could establish fraud in fact.

Before, therefore, this mortgage can be impeached, it must be shewn that a fraud upon the Act was intended. Read in the light of subsequent events, it appears that the company was in an insolvent condition, and it was known to them and to the plaintiffs at the time that they could not meet their liabilities as they matured, and the company knew that they had mortgaged everything that was available; but unless we are to assume that the statements made by the manager to the president were made fraudulently, and that he was a party to the fraud, we cannot avoid giving weight to these statements, viz. : that the one stated that, from his knowledge of the position of the company's affairs, he felt assured they could pull through if they got the required extension from the company; and that the other believed that statement and acted upon it in good faith.

In point of fact the plaintiffs were the largest creditors of the company, and if they had insisted in forcing their claims, it was impossible for the company to go on, and we find therefore the president frankly stating that they must make an assignment; but there are times in the experience of a great many business men when they would have found themselves unable to meet their liabilities if pressed, who have nevertheless by a little indulgence succeeded in weathering the storm.

We have to look at this matter as things stood at the time the security was given. They had insufficient capital, and had made an unsuccessful attempt to raise more by the issue of preference shares, and they knew if these plaintiffs, their principal creditors, insisted on immediate payment, they must cease business and make an assignment.

The plaintiffs had made frequent applications about their claim, but until the letter of the 26th April, the board had been led to believe by their manager that they would wait indefinitely, that letter required immediate action. The manager who appears to have been a sanguine man had been promising to make the thing a success and induced them to think so too.

Although they had been obliged to pledge their manufactured goods to the bank, they expected when the season for shipping arrived to realize from them, but they all felt that unless time was extended to them by their principal creditor, it was hopeless to attempt to carry on business.

The manager himself says that they had property available when realized to pay all their liabilities, with the exception of Long & Bisby, and that such was his confidence in the company that he purchased stock in it at par in the month of January.

He says that when he gave the assurance that he could carry the business through if he got the time stipulated for, he acted in good faith, and that the crisis was brought about by the refusal of their agents J. L. Lockhart & Co. to accept an order for margins that they admitted were due, which they were to pay over to him.

The plaintiffs themselves were examined, who confirm the manager's statement and say that he spoke hopefully that they wanted the instalments of the mortgage to be payable at earlier dates, and that they thought the remark made by the president as to the assignment was made in order to induce them to extend longer time.

I do not draw any inference unfavourable to the plaintiffs from the circumstance, remarked upon by the Chief Justice, of the president and others getting a consent from the plaintiff to assign their security to them. I should rather look upon it as confirming the view that they believed they could ultimately "pull through."

We ought not to presume fraud; if the act done can be properly referred to some other motive or reason than that of giving a particular creditor a preference over the other creditors, then I concur in the language of one of the cases, that neither the provisions of the statute, nor any principle of law or policy will justify a Court in holding that it was made with the intent mentioned in the statute. I think the onus is upon the execution creditor to establish this, and we ought, I think, in cases arising under the

statute, never to lose sight of the fact, that it is a race between creditors, and that unless fraud, that is a fraud upon the act is made out, one creditor who has obtained an advantage by his vigilance and diligence is entitled as much to the protection of the Court as one who comes with an execution.

If the giving of this mortgage had been a scheme to get rid of its being fraudulent by pretending that it was given for a present cash advance, it could not of course stand, but that is not pretended, and I cannot help thinking that the learned Judge's view of this "device" as he calls it in some degree affected his decision, but upon the evidence before us I have been quite unable to draw the inference he has drawn, because I do not think the plaintiff has satisfied the onus that was upon him, and because I adopt fully the view so ably expressed by the late Chief Justice Moss, to which I had occasion recently to refer, viz.: "It is matter of every day experience for an impeached transaction to be surrounded with circumstances of grave suspicion, but that the evidence not having carried the case beyond the region of suspicion, and fraud being a thing to be distinctly proved and not to be presumed the transaction cannot be set aside. Facts must be proved which lead the judicial mind to no other conclusion than that of fraud. If the evidence in such a case leaves the matter in doubt the complainant must fail."

I cannot say upon this evidence that the intent has been shewn, and there being no conflict of evidence, my conclusion is, that the defendants fail.

Upon the question of dealing with the finding of the Judge upon the question of knowledge by the creditor of his debtor's position, and upon the point that if there is any other motive open upon the evidence to which the act could be referred, the Court will not attribute the act to an intention to violate the law, I wish to refer to *Ex parte Topham*, L. R. 8 Ch. 614. Sir George Mellish in that case refers with approval to *Ex parte Blackburn*, L. R. 12 Eq. 358, from which I have made an extract, and then when dealing with the intent and motives of the debtor, says: "Was

it to give a preference to Topham, or was it to induce him to supply Messrs. Walker with fresh goods, or was it done in consequence of pressure from Topham? It is clear to me that it was done from one of the two latter motives. It is not necessary to decide whether their motive was—that they hoped that by paying in the form of goods, part of Topham's demand, they would obtain from him further credit and be able to go on with the business, or whether they knew they were hopelessly insolvent and only did it from pressure. In either case I am of opinion it was not a fraudulent preference."

In that case the Court of Appeal reversed the Judge of first instance, who had held that "it was as clear a case of fraudulent preference as ever he had heard of, and was clearly within the words of the Acts of Parliament, because the debtor was at the time unable to pay his debts out of his own resources, as proved by the exhibition of his balance sheet, and from the communication to Mr. Topham acquainting him with the fact."

So, here, the evidence shews that the motive actuating the debtors was that if they got an extension of time from their principal creditor, they would be able to go on and arrange with their other creditors from the goods on hand, and those they were about to manufacture.

There is no reason alleged why they should have desired to prefer these plaintiffs; on the contrary, they told them plainly enough that if they did not get an extension they must assign for the benefit of all.

I think there is no evidence to shew any intent on the part of the debtors to prefer these plaintiffs. Whilst there is abundant evidence to shew another motive for making this mortgage and as no Court is justified in assuming fraud, the defendants failed, and the appeal should be allowed.

PATTERSON, J. A.—I understand the judgment of the learned Chancellor to proceed upon the ground that the chattel mortgage from the Hamilton Knitting Co. to the plaintiffs is void under R. S. O. ch. 118, sec. 2, because

made when the company was in insolvent circumstances, and with the intent, which he finds to have existed, to give the plaintiffs a preference over the other creditors of the company. This is not the only matter on which an opinion is given in the judgment. The learned Chancellor intimates his opinion that the company was unable under the disabilities imposed by the Ontario Joint Stock Companies' Letters Patent Act, R. S. O. ch. 150, to give security for a past due debt. There is no doubt that the officers of the company had been so advised, and for that reason had put the transaction with the plaintiffs in the form of borrowing \$5,000, out of which the old debt was to be paid; and that, as the learned Chancellor truly remarked, the pith of the transaction was the giving of all the practically available assets of the company to the plaintiffs in security for their debt.

The several respondents rely, in support of the decision, upon the grounds mentioned in the judgment, including the objection under the Joint Stock Companies' Act; some of them adding an objection founded on the Dominion Act, 45 Vict. ch. 23, under which they say the giving of the mortgage was an act of bankruptcy; and one of them also relying upon the Chattel Mortgages' Act.

The last mentioned objection is clearly untenable. It is not necessary, in order to dispose of it, to do more than refer to the judgment of this Court recently pronounced in *Parkes v. St. George*, 10 A. R. 496. This mortgage would be upheld, even on the treatment of the statute insisted on in the dissentient judgment in that case which was delivered by myself. In addition to the cases there cited, those of *Davis v. Burton*, 11 Q. B. D. 537, and *Davis v. Usher*, 12 Q. B. D. 490, may be referred to.

The point made under the Dominion Act respecting insolvent companies was in effect disposed of during Mr. Martin's argument. That Act does not avoid transactions for the benefit of individual execution creditors like these defendants; and besides, we have no evidence of any proceedings under the Act.

The idea that this company was restricted by anything in the statute under which it was incorporated from applying its assets to the payment of its debts, whether by absolute disposal of them for that purpose, or by a defeasible disposal of them by way of mortgage, was founded upon a misconception of the 30th section of the statute. The decision of the Supreme Court in *Bickford v. Grand Junction R. W. Co.*, 1 S. C. R. 696, upon a similar provision in the Railway Act C. S. Can. ch. 66, sec. 9, and the cases cited by Mr. Justice Strong in delivering the judgment of the Court, p. 730, are conclusive against the opinion acted on by the company. That was a much stronger case than this, because there the mortgage was of the railway itself with all its franchises and powers; and the question arose upon the right to give a mortgage of that character.

The inquiry is thus brought back to the one point, namely, the effect of the statute, R. S. O. ch. 118, upon the security in question; and, for the purpose of this question we may put the form of the transaction out of view and consider whether the defendants have accomplished the task, the burden of which was upon them, of proving that the mortgage was given with intent to defeat or delay the creditors of the company, or with intent to give the plaintiffs a preference over the other creditors. Practically the last form of the question, viz., that relating to preference, is the only one to be considered. If the other creditors have been interfered with, it is by preferring the plaintiffs. If not by means of such a preference, then the intent to defeat or delay cannot be asserted in the face of the well settled construction of those words in the statute 13 Eliz. ch. 5. Indeed for all practical purposes, the statute 13 Eliz. ch. 5 remaining in force, the words "defeat or delay" might have been dropped from the enacting clause as they have been dropped from the title placed at the head of the chapter, and the word "preference" alone retained.

The evidence left no doubt on the mind of the learned Chancellor that the company was insolvent and unable to pay its debts in full when the mortgage was made. I am

not sure that we have distinct evidence of the value of the property mortgaged to the plaintiffs. It would be required to be very much more than the amount of the mortgage to equal the debts for which there was no immediate provision when the mortgage was made, and I am satisfied that the finding of the insolvency of the company is abundantly supported. There is thus one requisite of the statute established.

The other requisite is that which is prescribed by chapter 118, section 2, without reference to the amendment made in 1884 by 47 Vict. ch. 10, sec. 3 (O.), if that amendment has altered the effect of the section, which may yet be a question; and it is, that the mortgage was made with intent to give the plaintiffs a preference over the other creditors.

I have recently had more than one occasion to express my opinion that this intent is always a question of fact upon the evidence, and not an inference of law, further than it may seem so when the rule that a man should be taken to intend what is the natural and necessary consequence of what he does is applied to a transfer of goods, &c.

Now it is not proved that the necessary effect of this mortgage was to prefer the plaintiffs. The object in giving it, as sworn to by those best acquainted with the affairs of the company, was to obtain an extension of time from the plaintiffs to enable the business to be carried on; and, if we credit the evidence, there was a *bond fide* belief that by obtaining the time the company would be able to continue. That hope was disappointed, but the catastrophe was not occasioned by the giving of this mortgage. It is shewn to have been produced or precipitated by another cause, and there is no connection either direct or indirect proved between that cause and this mortgage.

How, then, do we gather the forbidden intent from the evidence?

If we believe the witnesses, there was no such intent. On the contrary, the aim and object were to carry on the business, in the hope, which may have been too sanguine and yet honestly entertained, that it would be made a success.

I cannot help feeling that the learned Chancellor took rather an extreme view of the facts in evidence, and although he does not rest his decision upon the manipulation of the debt and the loan by which the mortgage in its actual form was produced, he appears to treat that part of the transaction as indicating an indirect, if not a fraudulent intention. I do not regard it at all in that light. I take the matter to be precisely the same, for all purposes of the point we are dealing with, and as it bears upon the question of the intent to prefer, as if the mortgage had been made in the ordinary way for the debt of \$4,750. All the by-play of the loan and by-law is explained satisfactorily to my mind by the desire to avoid offending against what was understood to be the effect of the charter.

There is nothing illegal or reprehensible in shaping a transaction in a particular form in case it can only validly be effected in that form. There would be no legal objection to borrowing money under the powers and in the mode given and prescribed by sec. 30, even though the object of the loan was to pay an old debt.

After alluding to the form in which the transaction was put, his lordship went on to say :

“ But the pith of the transaction was the giving of all the practically available assets of the company to the plaintiffs in security for their debt. Now when this was being carried out both parties knew the desperate condition of the company ; all the machinery and chattels of the company which were worth anything were taken over by one creditor, with the knowledge that no assets were left to the company to satisfy other creditors. If this particular creditor was not content to accept what was offered by the company, it was told him that an assignment for the benefit of creditors was the only other alternative.”

I must say, with great respect, that the conclusion thus arrived at does not seem to me to give due effect to some of the facts. When it is said that all the machinery and chattels were taken over by one creditor, I think there is scarcely enough regard paid to the fact that they were only mortgaged, and not absolutely transferred. It is true that

once we arrive at the conclusion that the necessary effect, if not the conscious design, was to transfer them irrevocably, and that the object and hope of surmounting the perils of the crisis are inventions and did not really actuate the company's managers, the language of the judgment becomes appropriate; but we have then disposed of the whole case.

I do not draw any inference unfavourable to the good faith of the transaction from the intimation to the plaintiffs that an assignment for the benefit of creditors would have to be made, in case the plaintiffs did not accede to such terms as in the opinion of the manager would enable him to extricate the business from its immediate difficulties. All that is consistent with the absence of the forbidden motive.

I take the same view of this aspect of the transaction as my Brother Burton, but I have preferred to state it myself in place of merely expressing my concurrence with him, because I agree with what the learned Chancellor has said in his judgment respecting pressure. Apart from the opinion which I expressed in *Brayley v. Ellis*, 9 A. R. 565, that the doctrine of pressure has no application to this statute, I should hold that here the mortgage was not induced by pressure. What the plaintiffs wanted was payment of their debt, and what the company wanted was a further opportunity to prosecute its business, which, according to the direct evidence it was believed could be done successfully, if security from molestation on account of this debt were obtained.

I shall only add, that unless we draw inferences opposed to the direct evidence given for the plaintiffs, and not supported by any direct evidence given for the defendants, we cannot, in my judgment, hold this mortgage invalid under the statute without thereby deciding that a debtor who is insolvent cannot make any transfer, valid as against creditors, of his goods, &c., either by way of mortgage or absolutely, whereby, in the ultimate result, the transferee stands in a better position with respect to the assets than the other creditors.

To hold this we must ignore the statutory requisite of the intent; and when two things are made essential, viz., insolvent circumstances and intent to prefer, we must hold that the first will suffice without the second, or substitute the result for the intent, which the statute has not done.

I do not differ in this opinion from what I gather from his judgment to be the opinion of the learned Chancellor; but I think the evidence, when considered without prejudice from the action taken on the part of the company on the erroneous reading of the charter, does not establish the intent of the transaction as being to give the plaintiffs a preference, notwithstanding that the effect of their having the security may be to enable them to get their debt paid while other creditors may be less fortunate.

We are often reminded, in this Court, of the less advantageous position we occupy for deciding questions of fact than the Judge who saw and heard the witnesses, and we have usually been guided by the principle, the last expression of which we find in Lord Blackburn's judgment in *Smith v. Chadwick*, 9 App. Cas. at p. 194, when he said: "But still though the Court of Appeal ought not lightly to find against the opinion of the Judge who tried the cause, I think that the Court of Appeal, if convinced that the inference in favor of the plaintiff ought not to have been drawn from the evidence, should find the verdict the other way." We have had occasion in several cases of the same nature as the present to review the finding upon questions of fact similar to that now before us, amongst which cases are *Brown v. Sweet*, 7 A. R. 725; *McCrae v. Whyte*, 7 A. R. 103; *Brayley v. Ellis*, 9 A. R. 565; and *McLean v. Garland*, 10 A. R. 405. But the judgment of Lord Blackburn is, on this topic, chiefly valuable for pointing out why, in discussing the decision of a question of fact by a Judge, other considerations may be proper than those which apply to the verdict of a jury.

I agree that we should allow the appeal.

OSLER, J.A.—I have hesitated a good deal upon this case. The learned Chancellor's judgment seems to me to hinge to some extent upon the assumption, which may not have been contested before him, that the debtors were unable, under the 30th section of the Act under which they were incorporated, R. S. O. ch. 150, to give a mortgage for a debt already incurred, which thus leads him to the conclusion that the arrangement by which the debt was converted into the phantom of a loan was a mere fraudulent, or *quasi* fraudulent, device to evade the Act, by doing indirectly what could not be done directly. With great respect, I cannot think that view well founded. The cases of *The Inns of Court Hotel Co.*, L. R. 6 Eq. 82; and *Bickford v. Grand Junction R. W. Co.*, 1 S. C. R. 696, are clearly against it. The debtors might, without question, have mortgaged their property to a third person to secure money borrowed for the purpose of paying the plaintiffs' debt; and why should they be unable, unless the Act directly prohibits it, which it does not, to convert their debt into a loan by a transaction directly between their creditors and themselves? I think they could do it, and that there was nothing fraudulent or improper in the course they adopted, unless it is obnoxious to the Fraudulent Preference Act. The instrument is to be looked at as being just what all parties openly intended it to be, a security for the plaintiff's debt. Then the question is, whether it was given with intent to prefer the plaintiffs to the debtors' other creditors.

The debtors were at this time insolvent. I think that they must have known that they were. The plaintiffs knew it too. Still if the latter merely demanded payment of this debt and the debtors had, as the result of or induced by that demand, paid it or given security, the presumption of a fraudulent intent would be repelled, and the creditors would be entitled to keep what by their diligence, they had obtained.

The learned Chancellor refers to the cases of *Ex p. Hall*, 19 Ch. D. 580; *Re Griffith*, 23 Ch. D. 69; and *Re Boon*, 41 L. T. N. S. 42; and I cannot help thinking that he has

the return of the motion, allowing the following documents to be put in evidence :

1. Petition of Isabella Wigle, directed to His Excellency Sir John Colborne, dated 20th October, 1832, with indorsation thereon.

2. Order in Council, dated 8th November, 1832, allowing Isabella Wigle to locate lot lettered H., Township of Gosfield.

3. Location ticket granted to Isabella Wigle, dated 12th November, 1832.

4. Description for patent of lot H. in the 2nd concession Gosfield, issued by Surveyor General, and dated 18th December, 1835.

The other facts are stated and the authorities referred to in the reports of the case in the Court below, and in the present judgments.

J. H. Ferguson, for the appellant. The Court below in considering the effect of the letters patent proved at the trial, dealt with the question as if it had been a case of ordinary grant or conveyance by one subject to another, and required proof of delivery to the grantee.

It is submitted that in this they were wrong, and that mere production of grant by letters patent under the great seal, proves conclusively everything necessary to vest in the grantee the thing granted, because :

1st. The patent is a record which established conclusively the performance of every pre-requisite necessary to the completion of the grant, which the patent records as having been made, and

2nd. It operates as a conveyance at common law, and requires no assent on the part of the grantee. Livery of seisin was never necessary to perfect a crown grant.

As stated in *Clench v. Hendricks*, Taylor R., at p. 405: "The King's patent operates like a deed of feoffment with livery of seisin, and completely passes the estate, and the grantee is in actual possession by virtue of the patent—all the authorities are clear as to the point." See : *Weaver v.*

Burgess, 22 C. P. 104 ; *Cruise's Digest*, vol. 5, p. 45, title 34 ; *Blackstone*, (Kerr,) 4th ed., vol. 2, p. 300 ; *Ludford v. Greton*, Pl. Com. 499 ; *Willion v. Berkley*, Pl. Com. 223 ; *Blackwell on Tax Titles*, 78.

And so long as the patent stands unrepealed it renders any evidence to the contrary inadmissible, unless where the patent is absolutely void, as where the Crown had nothing to grant. See *Ramsbottom v. Buckhurst*, 2 M. & S. 565.

Moreover the evidence shews that here one of the pre-requisites to the granting of the patent was a request by the grantee, who must have petitioned for the grant, and it is submitted that the patent is a record, and, as such, conclusive proof of the compliance with this and all other pre-requisites, and renders unnecessary any further proof of assent or acquiescence on the part of the grantee.

The Statutes of 3 and 4 Ed. VI., ch. 4, and 13 Elizabeth ch. 6, make the exemplification of the letters patent equally good evidence with the patent itself, and it has been held that these Acts extend to patents granting land. See *Doe Fitzgerald v. Finn*, 1 U. C. R. 70.

It is submitted therefore that the evidence proves that the fee simple in this land did on the date of the patent vest in Isabella Wigle a married woman. See Exhibit No. 17.

If this be so it could only have been divested either :

1st. By conveyance or assurance sufficient according to the law as it then existed to pass the title, or

2nd. By judgment upon a *sci. fa.* to repeal the patent, which is the proper remedy where the Crown has inadmissibly granted anything by letters patent which ought not to have been granted, or when the grantee hath done some act which amounts to a forfeiture of the patent: *Stephen's Commentaries* 9th ed., vol. 3, p. 678.

No such proceedings were taken here, and without them the officers of the Crown, having once issued the patent under the great seal, were powerless to control its effect or rescind it.

The document executed by Mercer was not sufficient to divest the patentee of title, for: It does not even mention the name of the patentee. It does not profess to be executed on her behalf. There is no evidence to shew that Mercer had authority to act for Mrs. Wigle.

A married woman could not at that date lawfully appoint an attorney to convey her real estate for her, nor could her real estate have been conveyed in any other way than by deed, duly acknowledged, and executed jointly with her husband in accordance with the provisions of 59 Geo. III., ch. 3: see *Doe McDonald v. Twigy*, 5 U. C. R. 167; *Doe Bradt v. Hodgkins*, 2 U. C. Jurist, O. S. 213: *Foster v. Beall*, 15 Gr. 244; and any conveyance executed by her other than as above would have been absolutely void.

Moreover upon the issue of the patent, her husband became entitled to a freehold estate in possession in this land for the joint lives of himself and his wife, and would be a necessary party to any contract for the release or surrender of the same.

It is submitted therefore: That the sale for taxes and conveyance by the sheriff in pursuance thereof vested the fee in the purchaser, and that the subsequent patent to him, through which the defendant claims, is absolutely void, and is no defence against the plaintiff's title under the purchaser at the tax sale, for "the King can no more grant what he no longer owns than a subject can," and a patent of lands which had before been granted to another will be held void in ejectment brought by the first patentee. See *Doe Malloch v. The Principal Officers of H. M. Ordnance*, 3 U. C. R. 387.

Nothing can be presumed, nor does any equity arise to assist the defendant, from the alleged fact that the Crown granted another lot to Isabella Wigle in lieu of that said to have been surrendered, for the further evidence now admitted shews that, if any such grant was made, it was not till after the sale for taxes of the lot now in dispute when we find her petitioning for another grant, and it is submitted that anything which took place after the title

in fee simple had been vested in the purchaser by the sheriff's deed could not affect it.

But even if nothing passed by the patent to Isabella Wigle, it is submitted that the sale for taxes and sheriff's deed in pursuance thereof, operate under the statutes to vest a title in fee in the purchaser even as against the Crown.

In *Doe McGillis v. McDonald*, 1 U. C. R. 432, it was held that lands described as "Granted" by the Surveyor-General (as this land was) were taxable under 59 Geo. III. chs. 7 and 8, although no letters patent for them had ever issued. And as to sale for arrears under 6 Geo. IV. ch. 7, see judgment of Sir John Robinson in that case, p. 435; *Charles v. Dulmage*, 14 U. C. R. 585.

In *Doe Stata v. Smith*, 9 U. C. R. 658, it was held that lands returned in the Surveyor-General's schedule in June, 1820, would on 1st of July, 1820, become chargeable with that year's rates under both statutes of 59 Geo. III. chs. 7 and 8.

The sheriff's deed under the Act conveyed to the purchaser a title in fee simple: see judgment of Draper, C. J., *Ryckman v. Van Voltenburg*, 6 C. P. at p. 387.

In any event it is submitted the appellant is entitled under the provisions of 33 Vict. ch. 23, sec. 13, to a lien upon the land for the purchase money paid at the tax sale and interest, and for the amount of all taxes paid by him since and interest.

Falconbridge and *T. M. Morton* for the respondent. The burthen of proof in such cases as this is on the purchaser at the tax-sale. The regularity of all proceedings is to be shewn by him, and the remedial statutes 33 Vict. ch. 23, &c., do not here apply. Sales and purchases founded on forfeitures deserve no indulgence from the Court: *Cooley on Taxation*, pp. 322, 325, 326, 329. The question is not of surrender of the grant and re-conveyance of the estate. There was an immediate disclaimer and disagreement to the grant, which had been made improvidently, and without any request of the grantee, and the Crown

simply revoked the patent and resumed the land; and it is to be observed that the new grant to Isabella Wigle refers only to the original order in council of 1808. If title ever vested in Isabella Wigle, and if the document executed by Mercer is for any reason defective as a surrender or conveyance to pass her interest, yet after this lapse of time a valid and effectual surrender will be presumed, the Crown having accepted the same, and acted on it by granting another lot in lieu thereof to Isabella Wigle, and by subsequently granting a patent of the lot in question to H. L. Hime: *Best on Presumptions*, pp. 74, 89. The surrender has always been recognized by the Crown (see indorsement on Nelson's petition.) A similar presumption will be made as regards Isabella Wigle's alleged coverture, and her right to convey or appoint an attorney: *Doe Wilson v. Wessells*, 5 O. S. 282; *Doe McDonald v. Twigg*, 5 U. C. R. 167. It follows that the sale for taxes was invalid; the title was in the Crown at the time of the original sale during all the time for which the taxes were charged, and no authority to sell was therefore given by either 59 Geo. III. ch. 7, or 6 Geo. IV. ch. 7; even if the title ever was in Isabella Wigle, there were no taxes properly charged upon the lands before the surrender to and acceptance by the Crown. Enrolment of a surrender to the Crown is not necessary in this country: *Regina v. Guthrie*, 41 U. C. R. 148, and *Hambly v. Fuller*, 22 C. P. 141, but what is enrolment here? has it not been practically effected by the delivery of the old patent and deposit of the surrender in the Crown Lands Department? The Crown had been in possession from 1820 to the 21st of February, 1868, and the Statute of Limitations is a bar to this action: *Viner's Abr. Bd.*, 4 page 176; *Comyn's Digest*, vol. 7, pp. 76, 77, D. 64, D. 68. The plaintiff and those through whom he claims had notice of all the facts, and therefore the plaintiff has no lien on the land, or claim against the defendant for the purchase money paid at the tax sale, or for taxes paid since, under the provisions of the 33 Vict. ch. 23.

October 13th, 1885. HAGARTY, C. J. O.—Two points must be established to support the judgment appealed from.

1. That the estate never vested in the intended grantee, Isabella Wigle.

2. That the land was not saleable for arrears of taxes, as being vested in the Crown as actual and beneficial owner.

I do not see my way, with any reasonable clearness to interfere with the judgment below on the first point.

On the reason of the thing, and on the authorities, it seems settled that an estate cannot be forced upon an individual against his will.

It may, and will be assumed, in the absence of any dissent or disclaimer, that the estate has vested in the named grantee, but the principle seems established that it cannot be forced upon him, nor will the Courts enter into the question in the presence of dissent or clear refusal to accept, whether it be in its nature a burdensome or a *damnosa hæreditas*: *Butler and Baker's Case*, 3 Rep. 26b, note; *Sheppard's Touchstone*, 285, ch. 15.

In the absence of any authority to the contrary, I do not see why the same rules do not apply to a grant of land from the Crown.

If it be conceded that the estate vested in Isabella Wigle, it seems almost impossible to hold that a valid surrender or reconveyance of such estate was ever made to the Crown.

The authorities on that point appear in the judgment.

But, for the reasons therein stated, I do not see why the Court was not justified, under the very peculiar circumstances of the case, in holding that the estate never actually vested in the intended grantee.

I do not think that the mere use of the word "surrender" used by her in her petition that "she be allowed to surrender the patent," and the entry in the council books of the order that "the patent be surrendered," nor the deed executed by Mr. Mercer, nor the memorandum signed 20th September, 1820, by the Lieutenant-Governor representing the

Crown, indorsed on the patent, "the surrender accepted," should force us to hold that the transaction necessarily amounted to an ineffectual surrender of an estate, thereby admitted to have been vested in the named grantee.

I think we may assume the transaction to amount in substance to a recalling and agreement to cancel the patent as never having been asked for or accepted by the grantee, and as having been issued by mistake.

The Public Lands Act of 1853, 16 Vict. ch. 159, sec. 18, expressly gives power to the Governor-in-Council to direct the cancelling of any patent that "has been or may hereafter be erroneously issued, or which shall contain any clerical error or misnomer, or wrong description," &c., &c., there being no adverse claims, to direct the issue of a correct one in its stead, to relate back to the date of the one so cancelled, and with the same legal effect as if issued at date of cancelled patent.

Sec. 19 enacts that where grants have issued, or may hereafter issue, for the same land inconsistent with each other, through error or mistake, and in all cases of sales or appropriation of the same land inconsistent with each other, the governor may order a new grant equivalent to the land of which any grantee or purchaser may thereby be deprived, but the claims must be made within five years after discovery of the error. A somewhat similar provision appears in 4 and 5 Vict. ch. 100, sec. 25, 1841.

I merely refer to these provisions as indicative of the desire of the Legislature to extend the powers of the executive in dealing with errors.

In the early days of this Province, covering the period of these transactions, there seems to be but little legislation either restricting or enlarging the management of the public lands. In the Revised Statutes of Upper Canada, the earliest Act professing to give general directions as to management seems to be in 1838: 7 Wm. IV. ch. 118.

In the absence of direct statutable directions, we can readily understand that the old rules regulating the granting and surrendering of lands by or to the Crown were

not very rigidly observed, and that it would be thought sufficient where an intended grantee repudiated and expressed dissent from the grant, and gave up the patent, and the Lieutenant-Governor-in-Council formally endorsed thereon the Crown's assent to the surrender thereof, that the Crown was then at liberty to deal with the land therein mentioned as its undoubted property.

Assuming that the estate of the Crown was never vested in Isabella Wigle, we pass to the second point.

The Surveyor-General, in accordance with the existing law, had, in 1820, sent to the county treasurer a statement shewing that this lot had been patented to Isabella Wigle.

No notice was ever given of the resumption of the land by the Crown.

In the present case the returns of the Surveyor-General shewed that the lot had been "deeded;" therefore, we have not necessarily to consider the peculiar case of land "described for patent."

The history of this latter provision is well traced in such cases as *Doe McGillis v. McDonald*, 1 U. C. R. 432; *Charles v. Dulmage*, 14 U. C. R. 585; *Doe Bell v. Orr*, 5 O. S. 433; *Ryckman v. Van Voltenburg*, 6 C. P. 385.

When so described for patent, the Crown, in effect, declared that all its claims were satisfied, and that the estate was ready for the person entitled, and that nothing remained but the mere formal execution of the grant.

The land in such a case, as clearly pointed out by Sir J. B. Robinson, could well be sold in fee simple without any substantial injury to the rights of the Crown, as the law then stood.

Subsequent acts have apparently much narrowed this practice.

For example, see sec. 138 of the Assessment Act, U. C. Consol. Stat. ch. 55, and Act of 1863, 27 Vict. ch. 19, and the judgment of Mr. Justice Gwynne in *Church v. Fenton*, 28 C. P. 384, 4 A. R. 159, where most of the statutes are noticed.

Here the patent was sealed in 1818. In June, 1819, she presented her petition, and on September 20th, 1820, its prayer was allowed in council, and the so-called surrender accepted.

Three months before this acceptance, the Surveyor-General appears to have sent his return to the treasurer.

In 1832 Isabella was allowed to locate her grant in another lot, apparently on her original claim to the bounty of the Crown, as the daughter of a U. E. Loyalist.

In the treasurer's books the lot stands charged with taxes from 3rd January, 1820—in one account from 1820—apparently to 1829, £3 13s. 1½d., which was received from the sheriff as the proceeds of tax sale. Warrant to sheriff, 19th October, 1829; sale, October 21st, 1831; sheriff's deed to Peter Scratch, 8th November, 1832.

In the grant of 1818 she is described as a married woman. In her petition the following year, and in all subsequent documents, no mention appears of her being under coverture.

If no clear distinction can be made as to the dissent by a Crown grantee, and as between parties, the language of the Touchstone is very emphatic:

"From the moment there is evidence of disagreement, then, in consideration of law the grant is void *ab initio*, as if no grant had been made, * * and in intendment of law the freehold never passed from the grantor."

In this case there was evidence of disagreement in 1819, at all events when the dissenting view was adopted by those representing the Sovereign in 1820.

At all events from the last named time, if not from the earlier, the Crown is in the position of beneficial owner, and fully seized of the estate.

If we adopt that view we have then to consider that the return made by the Surveyor-General, and the entry in the treasurer's book shewing a grant to Isabella Wigle, placed the land irrevocably, while such entry remained, liable to assessment and sale in default, although it was in fact Crown property, and the person named as grantee had ceased to have any interest.

This involves a very serious question.

If it be held to be liable to assessment and sale, then it must follow that, even if the Crown had, with due formality, taken a legal surrender or reconveyance of the land, the omission to notify this to the treasurer would have the land subject to assessment and sale.

The same consequence would follow if the Crown had proceeded against the grantee on any of the clauses of forfeiture contained in the patent (of which there are several), or had proceeded by *sci. fa.* to cancel or recall the patent, and had duly obtained judgment therefor. In all such cases the entry in the treasurer's books would enable the land to be sold for taxes.

I do not think that the Legislature has warranted any such proceeding. It would, in this view, be attaching to the treasurer's books a kind of overwhelming authority, in my judgment beyond anything to be found in the statute law.

In speaking of the effect of describing land for patent, Sir J. Robinson says, (1 U. C. R. 433), after reviewing the statutes :

"It is plain that what the Legislature meant was, that neither the lands in the actual possession and use of the Crown, nor its vacant and waste lands, should be taxed; but that lands which the Crown had granted to individuals, by order-in-council or certificate, were, for the purposes of those acts, to be regarded as no longer belonging to the Crown, but to the individual, at least until the Crown should rescind its order, and resume the lands for some failure on the part of the grantee."

The 59 Geo. III. ch. 7, in the language of Sir J. Robinson, (1 U. C. R. 432) "lays the foundation of the present system of assessment of unoccupied lands."

It was passed July 12th, 1819, and makes its provisions to commence operation on the first Monday in January, 1820.

The petition by Isabella, objecting to the grant to her, was received by the Executive Council 29th June, 1819, prior to the passing of this statute.

The Surveyor-General did not send his list to the treasurer till June, 1820, three months before the Crown's assent to the so-called surrender.

Her dissent and disclaimer were signified to the Crown before the passing of the Act, the Lieutenant-Governor's consent thereto, not till after.

Now this Act, like others, expressly declares that property, &c., in actual possession or occupation of His Majesty, except the Crown and Clergy Reserves actually leased to individuals, shall not be assessable.

The 6 Geo. IV. ch. 7, passed in 1825, makes the 59 Geo. III. perpetual, and, in effect, reiterates the exempting clause.

This land was sold for taxes reckoned from January, 1820.

If it be held that it ceased to be Isabella's land from the time of her dissent expressed to the Crown, viz: June, 1819, no taxes were ever imposed on it while, in any view of the case, she had any interest, and her interest (if any) ceased before the Act was passed.

If her alleged interest did not cease until the Crown assented to her disclaimer, then only a small portion of tax for 1820 was chargeable: *Doe Stata v. Smith*, 9 U. C. R. 658.

Unless, therefore, we are prepared to hold that the return to the treasurer, and the entry in his books, fixed indelibly on the land the liability to assessment and sale, notwithstanding it was by every legal solemnity made the beneficial property of the Crown, I cannot see how we can support this sale.

No legal process or conveyance can protect the Crown's right until the entry in the treasurer's books be corrected, if the plaintiff's contention be sound, and the argument may be pushed to the assertion that, even if the Surveyor-General erroneously returned the lot as described for patent, the tax title will be unassailable. *O'Grady v. McCaffray*, 2 O. R. 309; *Perry v. Powell*, 8 U. C. R. 251, may be referred to as to a mistake made by Surveyor-General in his return.

If the purchaser at the tax sale be aggrieved, or suffer damage by the alleged neglect of the Crown's officers to notify or explain the true state of the title to the treasurer, it may be assumed the Crown will do justice.

PATTERSON, J. A.—This is an action of ejectment, commenced in 1879, to recover lot No. 16, in concession A., of the township of Mersea, in the county of Essex.

The defendant, Oliver Scratch, claims by deed from one Hime, who obtained a patent for the lot in 1868.

The question is whether the fee had not passed under a sale of the lot for taxes in 1831, and sheriff's deed made in completion of that sale, in 1832, to one Peter Scratch under whom the plaintiff makes title.

In dealing with this question, we have to do with the law as it was in 1831 and 1832, without reference to subsequent legislative changes either in the system of managing the public lands, or in the assessment laws.

There are two statutes which bear directly on the question, viz, 59 Geo. III. ch. 7, passed in 1819, and 6 Geo. IV. ch. 7, passed in 1825.

The second section of the Act of 1819 defined what property should be deemed rateable property after the first Monday in January, 1820, and concluded with this proviso:

“Provided also that nothing herein contained shall extend, or be construed to extend, to any property, goods or effects, matters or things, herein mentioned or enumerated, which shall belong to or be in the actual possession or occupation of His Majesty, his heirs or successors, except the Crown and Clergy Reserves actually leased to individuals, which shall be liable to the same rates and assessments as other lands hereinbefore mentioned.”

Referring to this proviso in *Doe McGillis v. McDonald*, 1 U. C. R. 432, in which action the principal question was the liability of unoccupied wild land to be assessed while unpatented, Sir J. B. Robinson said (p. 433.):

“Now upon this an argument has been built, that lands of which the fee is still in the Crown are not charged with taxes; although such lands may have been located to indi-

viduals, and everything done to assure a title except the actual completion of the patent. That might be, and perhaps would be, the proper construction to be given to this proviso, if there were nothing in the Act to qualify the language used there, and to demonstrate that it was not intended to have that effect. But there is plain enough proof that the Legislature meant otherwise; because in the fourth clause, they declare that 'all lands shall be considered as *ratable property*, which are holden in fee simple, or *promise of a fee simple by land board certificate*, order of council, or *certificate* of any Governor of Canada.' Both this clause and the preceding proviso apply as much to lands of residents as of non-residents; and if only lands for which patents have been issued could be taxed in the one case, neither could they be taxed in the other. But it is well known, that with respect to resident proprietors, no such doubt has been started. The fact is that this statute, 59 Geo. III. ch. 7, furnishes no new ground for such a question; for both the proviso and the clause which serves as a qualification of it were merely transferred from the former assessment laws, which that Act repeals. The 43 Geo. III. ch. 12, and the two subsequent Acts of 47 Geo. III. ch. 7, and 51 Geo. III. ch. 8, are in the same terms in this respect; and looking at them all, or at any of them separately, it is plain that what the Legislature meant was, that neither the lands in the actual possession and use of the Crown, nor its vacant and waste lands, should be taxed; but that lands which the Crown had granted to individuals, by Order-in-Council or certificate, were, for the purposes of those Acts, to be regarded as no longer belonging to the Crown but to the individual, at least until the Crown should rescind its order, and resume the lands for some failure on the part of the grantee."

I cite the language of the judgment in this case, not because I take it to be a very direct authority upon any question which we have now to decide; but because the passage which I have now read, and others which I may refer to, contain remarks upon the statutes which, though made with immediate reference to the question then in discussion, which was not the same as that with which we have to deal, seem to me to indicate a view of the effect of the law such as I shall attempt to apply to the facts now before us.

The twelfth section enacted :

“That His Majesty’s Surveyor-General of this Province for the time being shall on or before the first day of July, which will be in the year of our Lord 1820, furnish the treasurer of each and every district thereof with a list or schedule of the lots in every town, township, or reported township of his respective district, as the same are designated by numbers and concessions, or otherwise, upon the original plan thereof, in which list it shall be specified, in columns opposite to each lot respectively, to whom the said lot, or any and what part thereof, has been described as granted by His Majesty, and whether the same, or any and what part thereof be yet ungranted, and also what lots are reserved as Crown and Clergy Reserves, or for other public purposes, and to whom such reserves, or any and what part thereof, have been leased by His Majesty ; and shall on or before the first day of July, in every year thereafter, transmit to the treasurer of such district, respectively, a schedule of all such lots or parcels of land, specifying the number of acres or other less quantity of land in each as have been granted or set to lease by His Majesty since the last schedule by him furnished as before directed.”

And section 13 :

“That all lands described in the said schedule as having been granted or let to lease by His Majesty shall, from the time they are returned in the said schedule, be assessed and charged to the payment of the rates or taxes imposed by this Act, in the respective districts in which they are situated, and not elsewhere, whether the same be occupied at the time of assessment or not.”

These two sections were the subject of comment by Sir J. B. Robinson in *Doe Bell v. Orr*, 5 O. S. 433, as well as in the later case of *Doe McGillis v. McDonald*.

In *Doe Bell v. Orr*, the land which had been sold for taxes had not been described for patent when the assessment was made, and the sale was therefore held invalid. After referring in his judgment to the former assessment Acts, under which only occupied lands were assessed, but under which all occupied lands were assessed notwithstanding that the right to obtain a patent may not have been absolute, the learned Chief Justice continued (p. 435):

“ But when they commenced the new system of taxing unoccupied lands belonging to absent owners, which is first touched upon in the 12th clause, they declared that the Surveyor-General shall return a schedule of all lands that have been *described* as granted by His Majesty in fee or for a term of years; and such lands as have been *described* are to be charged with taxes, as the Act points out. In speaking of lands that had been *described* by the Surveyor-General, the Legislature used a term well understood and that by the usage of the Government has a known definite meaning attached to it. A lot merely located is frequently never granted to the locatee. The location is sometimes changed, sometimes rescinded, sometimes treated as abandoned when the locatee has been long unheard of, and sometimes cancelled for non-performance of settlement duties, &c.; and the effect of treating lands so situated as liable to forfeiture for non-payment of taxes would be to create much confusion in the departments of the Government, and to divest the Crown of its estate for a forfeiture, while the land had really no representative subject to taxation. When a lot is *described*, on the other hand, all difficulties respecting the location are considered to be cleared up; and it is well known that when the Surveyor-General reports that a lot has been described, it is presumed in the public offices that a patent is out for it, unless the secretary, on search, reports otherwise.”

In *Doe McGillis v. McDonald* his lordship made remarks to the same effect regarding the history of the assessment of lands in the Province; and after pointing out various cases in which a locatee of land might never become entitled to a patent, he said (1 U. C. R. 434):

“ These things the Legislature well knew were frequently happening; and they knew also that before the Surveyor-General issued his description of the land for the purpose of having it inserted in the patent, all preliminary points were understood to have been ascertained, and the location recognized as free from difficulty; they, therefore, in the Act, required the Surveyor-General to state in his return to whom each particular lot was ‘*described as granted by His Majesty*’; and they provide ‘that all lands (so) *described* in his schedule as *having been granted*, should be assessed and charged with the payment of rates and taxes, whether the same be occupied at the time of assessment or not.’ ”

The statute of 1825, 6 Geo. IV. ch. 7, provided for the sale of lands on which taxes were eight years in arrear; the first day of July, 1828, being named in section 6 as the day to which the statement of the treasurer was to be made up. This date was extended by 9 Geo. IV. ch. 3, passed in March, 1828, to the first of July, 1829.

Directions are given in the statute of 1825 for the various steps leading to the sale and conveyance by the sheriff.

The foundation of the proceedings was the return of the treasurer to the Quarter Sessions, in which he was to specify the lot or parcel of land in arrear by the number, concession, and township, or otherwise, as the same appeared in the schedule furnished to him by the Surveyor-General, and also the amount due for assessments thereon under the provisions of the Acts.

By section 15 it was provided: "That nothing in this Act contained shall extend to authorize the sale of any greater or other interest in the reserved lands of the Crown or Clergy, held in lease, for payment of arrears of assessments, than is possessed by such lessee or his assignee."

I shall read one remark from the judgment of the Chief Justice in *Doe McGillis v. McDonald*, which puts the effect of this statute in a few words and with great clearness. After his discussion of the effect of lands being described by the Surveyor-General, his lordship observed, p. 435: "If the legal question be so far clear, (as I think it is), there can be no doubt, upon reading the subsequent statute of 6 Geo. IV. ch. 7, which first authorized the sale of land for taxes, that, according to the provisions of that statute, all lands which the former had made chargeable are, by that Act, expressly made liable to sale, if necessary, in order to enforce the payment; at least all lands not coming within the exception of the fifteenth clause, which relates to Crown and Clergy Reserves only."

Having thus noticed the statute law to which we have to look, and the cases of *Doe Bell v. Orr* and *Doe McGillis v. McDonald*, I may as well, before passing to the facts, refer to three other cases.

Two of these, *Charles v. Dulmage*, 14 U. C. R. 585, and *Ryckman v. VanVoltenburg*, 6 C. P. 385, were before the Courts of Queen's Bench and Common Pleas at the same time, and involved the same general question. In each case land had been sold for taxes after being described for patent but before being patented. In each case the heir of the original nominee of the Crown obtained a decree from the Heir and Devisee Commission, and thereupon procured the issue of a patent for his lot. The contest in each case was between the patentee and the holder of the tax title; and the decision in each case was that the sheriff's deed conveyed the fee simple to the purchaser at the tax sale, and that therefore nothing remained in the Crown upon which the patent could operate. The ground on which the patentee in each case founded his action, as I happen to know from being engaged in both cases although it may not clearly appear from the reports, was that the tax sale vested in the purchaser only the right of the original nominee; that the decree of the commissioners was an adjudication in favour of the heir of the nominee as against the tax purchaser, who either claimed or might have claimed as assignee of the nominee; and that therefore the right to the patent and to the land was *res judicata*.

The report of the Heir and Devisee Commissioners in *Ryckman v. VanVoltenburg* was made in 1851, after the passing of 8 Vict. ch. 8, the tenth section of which statute expressly empowered the purchaser for taxes of unpatented lands to claim before the commissioners, and declared that for all the purposes of that Act he should be considered as an assignee of the original nominee of the Crown, and that his claim should be acted on and dealt with accordingly.

The report in *Charles v. Dulmage* was made in 1837, and the plaintiff in that action had not the Act of 1845, 8 Vict. ch. 8, to aid his argument.

The asserted *res judicata* is not in terms noticed in the judgments in either of the cases; but in *Ryckman v.*

Van Voltenburg, the Act of 1845 was referred to by Draper, C. J., who said (6 C. P. 387) :

“The statute 6 Geo. IV. ch. 7, sec. 18, authorizes the sheriff, in case the land sold for taxes shall not be redeemed in manner prescribed, on demand of the purchaser, his heirs or assigns to ‘execute a conveyance to him or them *in fee simple*, of the parcel of land so sold by public auction under the provisions of this Act.’ The language of the 15th section of the same statute, ‘that nothing in the Act contained shall extend to authorize the sale of any greater or other interest in the reserved lands of the Crown or Clergy held in lease, for payment of arrears of assessment than is possessed by such lessee or his assignee,’ must be taken in connection with the other section, and coupled with the 4th and 12th sections of the statute of 1819, appear to me to mean that in cases of leases from the Crown, only the actual legal estate and interest of the lessee, or his assigns can be sold ; but where there has been a ‘promise of the fee simple,’ and where the Surveyor-General has included in his schedule the land so promised, as land which has been ‘described as granted,’ the sheriff has statutory authority to convey a title in fee simple to the purchaser at a sale for taxes in arrear. The power given to the purchaser at such sale by the statute 8 Vict. ch 8, sec. 10, to claim a patent before the heir and devisee commission, as constituting him an assignee from the original nominee of the Crown, does not in my opinion militate against this view. It ought, I think, to be construed as intended to confirm and strengthen, but not to invalidate titles derived under the 6 Geo. IV. ch. 7. And when it is remembered that after the lapse of several years great difficulty might be met with in establishing step by step against an adverse claimant a title so derived, it will not be considered a useless enactment to enable such purchasers to obtain a grant from the Crown in their own names, thereby establishing their title and providing the easiest mode of its proof.”

These two decisions can scarcely be said to add much, upon the effect of the sale for taxes, to what was decided in *Doe McGillis v. McDonald*, nor do they bear more directly than that case on the form of the question now presented for decision ; but they may usefully be borne in mind as very distinct affirmations of the conclusive effect

of the sale for taxes in vesting in the purchaser the fee simple of the land returned as "described as granted."

The third case, *Doe Stata v. Smith*, 9 U. C. R. 658, I merely mention as the case in which it was decided that lands returned by the Surveyor-General in June, 1820, as being "described as granted" became chargeable on the first of July, 1820, with that year's taxes, and therefore, in July, 1828, the taxes on those lands would be eight years in arrear.

We cannot reasonably expect much assistance in the investigation of the transactions now in question from decisions under later forms of our assessment laws. I shall therefore forbear to discuss any of those cases.

The lot now in question was returned by the Surveyor-General on 24th June, 1820, as "described as granted."

It was the fact that two years earlier, viz., on 19th June, 1818, a patent had been executed granting the lot to Isabella Wigle, wife of Wyndal Wigle, and daughter of Leonard Scratch, an U. E. Loyalist. I do not now refer to this as a material circumstance, and it certainly did not render the land liable to assessment in 1820 to any greater extent than the description for patent by the Surveyor-General would have done.

Each of the lots returned by the Surveyor-General seems to have been marked on his schedule with the letter D or the letter L.

Mr. Wright, the present treasurer of the county of Essex, said in his evidence that D in the schedule signified "deeded;" and a letter of his is in evidence in which he says that D means "deeded" and L "located." This is an evident misapprehension. The initials must have been used to designate the two classes of *described* lands and *leased* lands, which the statute required the Surveyor-General to distinguish for the information of the treasurer.

The regular steps from the return in 1820 to the sale of the lots in October, 1831, for eight years' taxes certified as due on 1st July, 1828, and the sheriff's deed, dated 8th November, 1832, conveying the land to Leonard Scratch,

the purchaser, are shewn by the evidence, and their regularity (apart from the dispute concerning the liability of the land to be assessed) has not been questioned.

We have therefore the lot "described as granted," and so included in the Surveyor-General's schedule, followed by every incident necessary under the terms of the statutes to vest the title in fee simple in Leonard Scratch.

Why, then, is it to be held, in favor of the patentee of 1868 or his assigns, that the fee did not so vest but remained in the Crown?

The contention is, that some things happened which prevented the fee from passing under the patent of 1818 to Mrs. Wigle, and that if it did pass it was surrendered in 1820.

The evidence is, that "under an Order-in-Council of 30th January, 1808, granting the petitioner 200 acres of land as the daughter of Leonard Scratch, an U. E. Loyalist, lot No. 16 in the concession A of Mersea was located on the 3rd of April, 1818, by her agent Alexander McCormick, Esq., and a description issued for the said lot on the 13th June in the same year."

The execution of the patent promptly followed, the date being 19th June, 1818.

Then we have a petition from Mrs. Wigle dated 17th June, 1819, asserting that in contradiction to a petition submitted by her before the late war through Col. Elliott, and without any subsequent petition by her for the purpose, the lot 16 had been granted to her: that that appeared to have been done through a mistake, kindly meant, but without any authority from her of [Qu. to?] her agent: that finding the lot 16 to be worthless, she asks permission to surrender the patent, which had thus causelessly issued in her name, and to be favored with a new grant of such land as William McCormack, Esq., M.P., the favorer of that petition might indicate in her name. That petition was presented by Mr. McCormack, and was read in Council on 30th September, 1819, when it was recommended that the patent be surrendered and leave granted petitioner to locate another lot.

Then we have a document or indorsement on the letters patent, which seem to have been handed back to the department, which is as follows :

"Be it known that I, Andrew Mercer, the attorney named in the annexed power, do, by virtue thereof, hereby surrender, yield, and deliver up unto our Sovereign Lord the King the within letters patent and the lands and premises thereby granted, with the appurtenances, the same being unfit for cultivation.

"In witness whereof I have hereunto set my hand and seal this sixth day of September, in the year of our Lord one thousand eight hundred and twenty.

"Sealed and delivered in presence of	}	"ANDW. MERCER." [L.S.]
"JOHN BEIKIE,		
"GEORGE SAVAGE."		

"Surrender entered 19th December, 1820. W. B. J.

"In Council, 20th September, 1820, the surrender was
accepted. P. MAITLAND."

Now, after the fullest consideration which I have been able to give to the case, I am unable to concur in the opinion of my learned Brethren who consider that the rights of the purchaser at the sale for taxes are to be governed by what took place between Mrs. Wigle, or gentlemen who acted in her name, and the Government or its officers.

The purchase was made under the sanction of the statutes, and I am unable to understand why the purchaser, while within the letter of those statutes, should be prejudiced by anything outside of them.

I do not overlook the argument that the second section of the Act of 1819, which includes in its general terms all lands amongst ratable property, has the proviso that nothing in that section shall apply to property which shall belong to, or be in the actual possession or occupation of, the Crown, except Crown and Clergy Reserves; but we have the equally precise enactments of secs. 12 and 13, which make the liability of land depend on its being returned as

“described” by the Surveyor-General. This land was so returned, not by error, but truly; and although a fresh return was made every year in obedience to the statute, this lot continued on the schedule as originally entered there.

In one passage which I have quoted from the judgment in *McGillis v. McDonald*, the effect of the fourth section of the statute in modifying the reading of the second section is noticed. The 12th and 13th sections must, in my judgment, be read also along with and as supplementary to the second, so far as the second relates to lands, and as giving a description, on which purchasers, acting under the Act of 1825, were entitled to rely, of the assessable lands of the Province.

The statute would otherwise prove a trap to persons who purchased in reliance on its terms. I do not say a trap to *unwary* purchasers, for there was no means by which the most careful man could undertake to verify the Surveyor-General's return.

It was never intended that a purchaser at a sale in Essex should investigate the proceedings of the Crown Lands Department in Toronto before paying his money. The statute had declared what should render a lot assessable, and the inference that the returns were intended to be confidently relied on and might be safely acted on is, I think, strongly enforced by the discussions in the judgments from which I have read quotations.

If any parcel of land which really did belong to the Crown came to be sold by reason of being included by error in the schedule, as *described*, when it was only under lease, or was even neither leased nor located, I think it would be proper to construe the statute so as to protect the purchaser; and that the loss of a lot of land to the public through the carelessness of its servants, or rather the transfer of its value from the general public to the local municipality, would be a smaller evil than the casting of doubt on the safety of relying on the terms of a statute by which people are invited to purchase these

lands. But here there was no error. The land was described for patent, and was correctly so returned by the Surveyor-General.

A suggestion has been made, though not relied on as an argument against the more literal construction of the 12th and 13th sections, that a purchaser who pays his money at tax sale for land which turns out to be Crown land, and who therefore does not get the land he pays for, may have some remedy by petition to the Crown. I do not understand it to be suggested that he would have any legal claim; but apart from the impracticability of the thing which seems obvious enough, the very attempt to assert a claim for a return of the money would involve either the concession that the suppliant ought not to have relied on the Surveyor-General's schedule, and so that he lost his money by his own folly, or the contention that he was justified in relying upon it, in which case he ought to get the land.

And besides this, the suggestion, if good to any extent, points equally to a remedy for the second patentee, who may ask for compensation without disturbing the tax purchaser.

If my views of the statute are correct, it will follow that the fact that the land never passed by the patent to Mrs. Wigle, or that having passed it became re-vested in the Crown by surrender, cannot be decisive of the right of the purchaser under the tax sale.

But I have not been convinced that the land did not pass, or that it was ever re-vested; nor do I take the view intimated by the learned Chief Justice in the Court below, of natural justice being more on the side of the patentee of 1868 than of the purchaser of 1831. I should prefer to apply the maxim acted on by courts of equity as well as by courts of law: "*Qui prior est tempore potior est jure.*"

I certainly do not feel pressed by any obligation to give more than their necessary legal force and effect to the dealings between Mrs. Wigle and the Government, as against the tax purchaser who, so far as we are told, knew nothing of them.

Prima facie the land passed by the letters patent when sealed and recorded. To quote from *Blackstone's Commentaries*, "Royal grants are matters of public record. For as St. Germyn says, the excellency of the Sovereign is so high in the law that no freehold may be given to nor derived from the Crown but by matter of record * * These grants, whether of lands, honors, liberties, franchises, or aught besides, are contained in charters, or letters patent, that is open letters, *literæ patentēs*."

It is argued that in this case the title did not pass by the letters patent, because Mrs. Wigle objected to take the particular lot, and in support of the proposition of law we have been referred to some authorities.

I shall not discuss the cases at any length, because I do not find that the law laid down in them adds much, if anything, to what I shall read from *Sheppard's Touchstone* by Preston, ch. 15.

"A feoffment, gift, grant, or lease, and the estate thereby made may become void by forfeiture," &c. * * Also they may become void, or rather fail of effect, by disagreement or refusal; and this may be either by the disagreement of the party himself to whom it is made, or by the disagreement of another—of the party himself: for no estate can be made to a man of anything in fee simple, for life, or otherwise, against his will; and therefore, by his disagreement or refusal of it, the estate itself, and the deed whereby it is conveyed, may become void; by the disagreement of another; as the husband, in case of a feoffment, &c., made to his wife, may by disagreement avoid it * * The law presumes that every grant, &c., is for the benefit of the grantee, &c.; and therefore till the contrary is shewn, supposes an agreement to the grant. From the moment there is evidence of disagreement, then in construction of law the grant is void *ab initio*, as if no grant had been made, * * and in intendment of law the freehold never passed from the grantor. And before agreement the grantee may waive it, and so avoid the estate and the deed also whereby the estate is made. But after agreement, the estate cannot be waived, except in the case of a married woman or an infant: and a married woman when free from coverture, or in case of her death, before agreement, then her heir: and an infant notwithstanding an agreement during minority, may disagree when he is adult. &c. or his

heirs may disagree, unless the estate was accepted by the ancestor, when adult. And if it be but a lease for years that is made, he may waive and avoid that by word of mouth in the country, as well as a gift of goods. * *

But if it be an estate of freehold that is made by feoffment, &c., it seems he cannot waive and avoid that but in a court of record." These last words are those of the author of the Touchstone. Mr. Preston adds: "This conclusion is too general. It is observable, that by the rules of the common law, an estate could not vest in a man without livery to him or his attorney; and acceptance of livery by him or his attorney, was considered an agreement."

Now, without pretending that my research into this rather unfamiliar subject has been of an exhaustive character, I think it sufficient for my present purpose to say that I have not met with any statement of the law in which dealings between the Crown and the subject were alluded to. In every case I have seen, the question has been between subject and subject; and while I do not venture to affirm with confidence that the same principles may not apply in both cases, I cannot at present lay my hand on authority which satisfies me that they do so apply; and there are reasons which cause me to hesitate before accepting the rule which applies between subjects as applicable to grants from the Crown.

A deed from a subject becomes operative only by delivery. Delivery I understand to involve the acceptance by the grantee, as well as the manual or symbolic act of the grantor. Acceptance will ordinarily be assumed in the absence of refusal or disagreement; but refusal or disagreement at any time before actual acceptance will rebut the presumption of acceptance, and so avoid the deed, or, more properly, shew that it was never operative. That is, if I am not mistaken, the principle of the doctrine laid down in the passages I have quoted from the Touchstone. The argument from the requisites of delivery will scarcely extend to devises, while it is well settled that an estate cannot be vested in a man against his will by devise, any more than by deed. But taking a devise to be, as put by

Bayley, J., in *Townson v. Tickell*, 3 B. & Ald. 31, 38, "nothing more than an offer which the devisee may accept or refuse," we have the necessity for his acceptance resting on grounds not very different from those which apply to a deed. In both cases the acceptance is essential to the operation of the instrument; and whether the acceptance is evidenced by formal words or conduct, or implied from the absence of dissent, the principle must be the same.

I may be mistaken in my deduction of this principle, though I have no reason, from anything I have met with in the books I have looked at, to think so. But if I am correct, I do not see my way to hold that the rule can be applied to the letters patent, which operate as matter of record, and that the record becomes void merely by the dissent of the patentee.

Nor am I prepared to find, as a matter of fact, that there was such dissent or disagreement before acceptance.

The lot appears to have been selected for Mrs. Wigle by Mr. McCormick who assumed to act as her agent, on 3rd April, 1818. The patent was sued out, doubtless by Mr. McCormick, with great promptness, for we have 13th June, 1818, as the date of the description for patent, and 19th June, 1818, as the date of the patent itself.

Having regard to these dates, I do not understand what is meant by the statement in Mrs. Wigle's petition of 17th June, 1819, that the lot was granted to her in contradiction to a petition submitted by her before the late war. We have no right to guess at what that petition may have contained, but we have good reason to assume that it did not object to lot 16, which was not located to her for years afterwards. At least, if there had been any previous selection or offer of that lot, we learn nothing of it from the evidence; and the inquiry upon which she found that the lot was worthless was evidently made after the issue of the patent, and not before the late war.

Then the Order-in-Council permitting her to surrender the patent, places the permission entirely on the ground of the character of the land, making no allusion to the alleged

improvidence in issuing the patent or to the oversight of the alleged petition.

If an issue were to be tried to determine the facts, there would seem to me from the little we know of the matter, room enough for a finding that the patent was accepted; but that, going to see the land and discovering that it was unfit for cultivation, the patentee asked and was allowed to give it up and take other land in its place.

I form no opinion as to how the fact ought to be found, further than as it now appears to me by no means so clear as was contended in argument that we ought to hold that there was a disagreement, in the sense in which that word is used in the passage from the Touchstone.

For illustrations of the slight acts which may evidence consent and cause the estate to vest, I refer to *Small v. Marwood*, 9 B. & C. 300, and some cases there noticed by Bayley, J., and to the report of *Siggers v. Evans*, 5 E. & B. 367.

If the estate did vest in Mrs. Wigle, it needs no argument beyond a mere reference to the document indorsed by Mr. Mercer, as a surrender, on the letters patent, to shew that no valid surrender was made.

Holding these views, I am not prepared to assent to the conclusion that the title has been shewn to have been in the Crown at any time after the execution of the patent of 1818; although holding as I do, that the question in controversy can only be properly determined on the ground that the lot was described for patent, and was, by virtue of the Surveyor-General's return, assessable and saleable for arrears of taxes, without necessary regard to the true state of the title, I have not pursued the inquiry into the title so far as to enable me to express my opinion upon it with entire confidence in its correctness.

I think we should allow the appeal, with costs.

OSLER, J. A.—This case comes before us as an appeal from the judgment of the Divisional Court, which, while agreeing with the judgment of Mr. Justice Burton at the

trial, as the case was then presented to him, nevertheless reversed it on the additional evidence subsequently admitted.

My conclusion is, that the judgment of the Divisional Court should be sustained, and substantially for the same reasons. I think we may treat what took place between the Crown and its grantee Elizabeth Wigle, as a clear and unequivocal act of disagreement and disclaimer on the part of the latter to the free grant or patent of the 19th June, 1818, or, at all events, as a cancellation and resumption by the Crown, with her consent, of the grant in question. I think the authorities shew that it is not essential to the validity of a disclaimer that it should be by deed or by record.

In *Jarman & Bythewood* on Conveyancing, by Sweet, ed. 1842. p. 702, it is said; "The old books are clearly against a parol disclaimer, but they appear to be overruled by modern authority."

In *Sheppard's Touchstone*, Preston's ed. p. 285, we find: "The law presumes that every grant, &c., is for the benefit of the grantee, &c.; and therefore till the contrary is shewn, supposes an agreement to the grant. From the moment there is evidence of disagreement, then in construction of law the grant is void *ab initio*, as if no grant had been made, * * and in intendment of law the freehold never passed from the grantor:" see also p. 452, title, Testament.

Butler and Baker's Case, 3 Rep. vol. 2, p. 72, note: "According to the modern decisions * * it appears to be the better opinion that the disclaimer need not be either by matter of record or by deed."

In none of the cases that I have seen from *Bonifant v. Greenfield*, Cro. Eliz. 80, to the present time is the contrary asserted, nor on principle is it necessary, since the disclaimer does not operate by way of re-conveyance. You do not disclaim to any one. It is a mere declaration of disagreement.

In *Nicolson v. Wordworth*, 2 Swanst. 365, Lord Eldon says (p. 371, : "What is the thing called a disclaimer? I have seen some prepared by the ablest conveyancers in a

form like this: 'I hereby declare that I have disagreed, and hereby disagree, &c., and hereby disclaim, &c.' What is the effect of that? That is sufficient."

The sole purpose being to evidence the disagreement to the grant, and to disclaim, not to revest, the estate, which is otherwise presumed to have passed by it, any clear unequivocal act which shews that intention should seem to be sufficient, though, no doubt, for the purpose of preserving evidence, a deed poll is the simplest form, and the one usually adopted. I refer also to *Thompson v. Leach*, 2 Vent. 198, 202, 206; *Doe Smyth v. Smyth*, 6 B. & C. 112; *Townson v. Tickell*, 3 B. & Ald. 31; *Begbie v. Crook*, 2 Bing. N. C. 70; *Siggers v. Evans*, 5 E. & B. 367, 381; *Peacock v. Eastland*, L. R. 10 Eq. 17; *Britton v. Knight*, 29 C. P. 567, and *Bence v. Gilpin*, L. R. 3 Ex. 76, where Kelly, C. B., says (p. 81): "A disclaimer, to be worth anything, must be an act whereby one entitled to an estate immediately and before dealing with it renounces it; whereby, in effect, he says, 'I will not be the owner of this property.'"

In the case before us we have the prompt disclaimer and repudiation of the grant by the grantee, who was at the time, for all that appears, *sui juris*, and is not otherwise described in her petition of the 17th June, 1819, than as "Isabella Wigle of Gosfield." It is a mere matter of words to say that because she uses the term "surrender," she must be taken to admit that the estate in the land was in her, as to which see *Nicloson v. Wordsworth*, *supra*, where a release with intent to disclaim was treated as a disclaimer. This surrender or disclaimer was followed by its official admission and acceptance by the Lieutenant-Governor-in-Council, and the passing of an order to permit Mrs. Wigle to locate another lot in lieu of the former, which, as is now made clearly to appear, she afterwards did, and received a patent therefor. Even if it be said that in the case of a patent from the Crown, the effect of which as an assurance by matter of record, in vesting the estate in the grantee, does not entirely depend upon the assent of the

party, a disclaimer does not operate as it does in the case of a conveyance between subject and subject, still, considering the period at which these transactions took place, and that the question was one wholly between the Crown and the individual grantee, no adverse claim existing, it appears to me, that these official acts done at the instance of and with the assent of the grantee, ought to, and may properly be treated as a cancellation of the patent, and a resumption of the land by the Crown: *Attorney General v. Garbutt*, 5 Gr. 181, 382.

The lot which had thus been granted in error to Mrs. Wigle being, or having become notwithstanding such grant, the property of the Crown, the plaintiff contends that by virtue of its having been once returned as described for grant or granted, it nevertheless continued chargeable to the payment of rates and taxes, and liable to be sold therefor under the legislation then in force. It has been settled by numerous authorities, that under the provisions of the Act 59 Geo. III. ch. 7, lands became liable to assessment from the time they were returned by the surveyor-general as described for patent, and under the combined provisions of that Act, and of the 6 Geo. IV. ch. 7, might be sold for arrears of assessment, even though no patent had actually issued therefor. The title acquired under the sheriff's deed was either the fee simple, or the interest of the Crown lessee according to the nature of the interest of the party in the land. The former, where he held the fee simple, or the promise of it, and the latter, if he was merely the lessee of the Crown. The sheriff's deed was held to be paramount to any title which could be acquired under a patent subsequently issued to the original nominee, or his heir, devise or assignee: *Charles v. Dulmage*, 14 U. C. R. 585; *Ryckman v. Von Voltenburg*, 6 C. P. 385; *Perry v. Powell*, 8 U. C. R. 251; *McGillis v. McDonald*, 1 U. C. R. 432.

The present case differs from all of those which have hitherto been decided in this respect, that the contest is in effect between the tax purchaser and the Crown, and not

between the tax purchaser and the representative of one to whom the Crown had parted with its interest, the legal estate merely not having been divested before the taxes had accrued.

One object of the Act was to make property which had been granted or sold by the Crown liable to assessment and sale for taxes, even though the grantor should delay to take out his patent. The provisions relating to distress for taxes and redemption after the sale, shew that it was only lands in which the Crown had ceased to have a beneficial interest which were thus made liable. I have read the case of *McGillis v. McDonald*, which was so much relied on at the bar, very attentively, but it is evident that the Court carefully refrained from saying that the surveyor general's return would be effectual where the right of the Crown was paramount, and its nominee had neither the legal or beneficial interest in the land. The whole reasoning of the judgment is directed against the contention that land could not be sold while the legal estate had not been divested from the Crown, and the learned Chief Justice shews with great force that the statute had effectually authorized that.

But the proviso contained in section 2 (59 Geo. III. ch. 7) governs and restrains the whole, as it appears to me: "Nothing herein contained shall extend, or be construed to extend, to any property, &c., which shall belong, or be in the occupation of His Majesty, his heirs or successors, &c." Such property is not ratable, whether it was erroneously included in the return or subsequently acquired by the Crown from its grantee, and therefore not liable to be sold under the subsequent Act. It stands on the same footing in either case, and the proposition the plaintiff is driven to maintain is, that once having been included in the return, it continues liable to taxation, whether it really never ceased to be, or afterwards became, by purchase or otherwise, the property of the Crown.

We do not derive much assistance from the later assessment Acts, and the decisions thereon; but I may refer to

the case of *O'Grady v. McCaffray*, 2 O. R. 309, in which the cases above referred to were discussed, and the opinion expressed that the return of the Surveyor-General might be shewn to be erroneous, which appears also to have been the opinion of the late Chief Justice Harrison, or rather the conclusion suggested by him from these cases.

It is hardly necessary to observe that the tax sale in question is not, by the remedial legislation of 1869 and subsequent Acts, made valid as against the Crown: see *O'Grady v. McCaffray*, 2 O. R. 309.

O'CONNOR, J., concurred in dismissing the appeal.

BROWN ET AL. V. JOHNSTON ET AL.

Equitable assignment—Contract of sale—Charging anticipated purchase money.

While the defendants C. & E. were negotiating with the defendant J. for the purchase of his stock of goods, the plaintiffs presented to C. & E. an order upon them for part of the anticipated purchase money, which order they had obtained from J. in payment of a debt due by him to the plaintiffs. This order C. & E. refused to pay or accept. The sale was subsequently completed, and the price paid in full to J. *Held*, that no charge on the purchase money had thus been created, and payment therefore could not be enforced against C. & E. *Mitchell v. Goodall*, 5 A. R. 164, and *McMaster v. Garland*, 8 A. R., 1, observed upon and explained.

THIS was an appeal by the defendants Cross & Edwards from a judgment given by one of the Judges of the County Court of the county of Middlesex, on the 13th day of January, 1883, whereby the defendants Cross & Edwards were ordered to pay the plaintiffs \$345.29 and costs.

The defendant Johnston was indebted to the plaintiffs in the sum of \$345.29 for goods sold and delivered by them to him.

On the 22nd of September, 1883, the defendant Johnston, who was negotiating for a sale of his business and stock in trade to the defendants Cross & Edwards, gave to the plaintiffs an order on them in the following words:—

“STRATHROY, September 22nd, 1883.

“MESSRS. CROSS & EDWARDS,—Please pay Messrs. Brown, Balfour, & Co. the sum of \$345.29 out of the moneys payable to me on the purchase of my stock by you.

“W. J. JOHNSTON.”

After notice to the defendants Cross & Edwards of the giving of this order, which they refused to honor, the sale of the stock was completed, and the whole of the purchase money paid over to Johnston and this action was therefore brought for the amount named in the order.

The appeal was heard on the 23rd of April, 1885.*

John Cameron for the appellants.

Gibbons for the respondents.

**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

June 23, 1885. HAGARTY, C. J. O.—It is clear on the evidence and admissions that when this order was signed by Johnston, on September 22nd, and given to the plaintiffs, there was only a negotiation proceeding between him and the defendants for the purchase of his stock of goods. Either party to this negotiation could have withdrawn from it at pleasure. It was not until September 24th, late in the evening, that any final arrangement was arrived at.

On the morning of the 24th September, an agent of the plaintiffs told the defendant Cross that they had an order from Johnston to pay them the amount of the order. Cross said he would not accept any order as they had not bought his stock. He did not see the order. About an hour after the agent came again and asked Cross how about this order. Cross said he would not accept any order, as he did not owe Johnston anything: that he had not bought the stock, and did not know that he would. Cross never saw the order.

On that night they completed or concluded to purchase, Johnston forbidding them to pay the order. He told them this shortly after the second time the plaintiffs' agent had called. Johnston said he had accepted a draft from the plaintiffs and it was not yet due. That was the reason they did not pay the plaintiffs, Johnston insisting on being paid the whole price, which was accordingly paid by the defendants.

Edwards's evidence is somewhat similar. The draft in question did not reach Strathroy till the 24th September, and Johnston then accepted it, and before defendants paid for the stock.

There is no suggestion or suspicion of any bad faith or collusion with Johnston on defendants' part. The right to recover here must apparently rest on this, that although there was no fund or debt in existence at the time the order was given, or when defendants were informed of it, yet, as defendants afterwards chose to purchase from Johnston, they must be bound to pay the amount of the order out of the purchase money.

I feel it a difficult matter to accept this view as correct.

I cannot understand how there can be an equitable or any other assignment or charge given on something that has no existence whatever.

It is not the case of an accruing debt or liability. It is not the case of a fund that must come legally into the hands of the person sought to be charged, or an assignment of a charge on freight, &c., to be earned. It is an attempt to create a charge on a negotiation for a bargain between two parties, so that where completion on either side is wholly optional, the negotiating parties can never complete the bargain, except on the terms of being bound by the attempted charge or assignment.

The effect, of course, must be, that the defendants must abandon all attempt to purchase, if the vendor refuse to sell except for the full price, disallowing the amount he at one time was willing that his creditors, the plaintiffs, should have.

The defendants refused to accept or in any wise recognize Johnston's order on this plain ground, that they owed him nothing, and could not tell whether they ever would owe him anything.

I think the vast majority of business men would have assumed, as defendants did, that they had nothing to do with any such attempted charge or assignment, situated as they were.

I have seen no case in which the law has been pushed to the extent here claimed by the plaintiffs, nor do I think that a rule of law should be unduly extended, which would never commend itself to the understanding or govern the transactions of business men of ordinary commercial intelligence or experience.

Lord Justice Brett said in *Field v. Megaw*, L. R. 4 C. P. 660, 664: "The law upon this subject is brought to such an exquisite degree of refinement that it is by no means easy to understand it."

I fear that any law of an "exquisite degree of refinement" is but ill-suited to the exigencies of business dealings.

Besides the class of cases collected in the notes to *Ryall v. Rowles*, 2 Wh. & Tud. 537, so often referred to, and the case in our own Court of *Mitchell v. Goodall*, 5 A. R. 164, we may refer to cases of charges on the sale of officers' commissions before the abolition of purchase in the army.

The contest was generally as to priority of charge and the notifying of the agent, who in due course would receive the purchase money on sale of the commission.

As I understand the cases, it is held that a notice of charge or assignment is of no effect until the agent is in possession of the funds.

In *Webster v. Webster*, 31 Beav. 393, 397, the Master of the Rolls, says: "The case of *Buller v. Plunkett*, 1 J. & H. 441, clearly shews, that, as between two equitable assignees, the time when notice is given is of no importance, if both notices are given previous to the period when the relation of trustee and *cestui que trust* is created, where that relation is not constituted until the money is actually received by or is due from the trustee."

In *Somerset v. Cox*, 33 Beav. 634, 638, the Master of the Rolls says that the notice given to the regimental agent, before the money is received, is an invalid notice. He points out (p. 641) that if Cox & Co., on receiving notice before payment had said: "We undertake to hold the fund in trust for you," they could not afterwards have said they had not notice. Sir Hugh Cairns there says in argument, "The principle is this—that you cannot go to a stranger and say, 'if you at any time hereafter should receive any money for A. B., take notice that I have a charge on it.'"

In *Addison v. Cox*, L. R. 8 Ch. 76, 79, Lord Selborne, C., discusses the question. He says: "The cases cited as to the sale of commissions, when they come to be examined, turn upon the fact that the notice was given to a mere possible agent before he was an actual agent—before the time at which he was in any sense liable to make payment, neither being himself a debtor, nor at that time charged with the duty of paying the money in question."

He says he agrees with these decisions. The legal position of the army agent is fully explained in this case by the Lord Chancellor. See also *Yates v. Cox*, 17 W. R. 20.

A case of *Walker v. Bradford*, 12 Q. B. D. 511, 515, may also be referred to. The peculiar position of the assignor's banker as to moneys received on assignor's account, after the creation of a charge of money then or thereafter to be standing to assignor's credit is discussed.

It may be quite true, though not necessary for the decision of this case, that Johnston did, or could as against himself, create a valid charge on the purchase moneys or chattels expected to be paid to or received by him, if a negotiation then pending with third parties ripened into an executed contract. The assignee might quite possibly be able to enforce his equity to a charge against such money or chattels when received in payment.

The distinction in the present case is, that the attempt is to make the defendants liable when there was neither fund nor property to charge, when they were not debtors or trustees, or liable in any way. If the plaintiffs' contention be sound, the defendants would have been forever disabled from completing any bargain with Johnston for the purchase of these goods, and possibly the argument would be pushed to the extent of equally affecting all persons having notice of the alleged equitable assignment.

It must always be borne in mind that the defendants in no way assented to or agreed to be bound by Johnston's premature order, or in any way misled the plaintiffs.

I may refer as to the general principle to *Ex p. Hall*, 10 Ch. D. 615, 620; *Adams v. Morgan*, 12 L. R. Ir. 1; *Clements v. Matthews*, 11, Q. B. D. 808, 812.

BURTON, J. A.—I think this is an attempt to carry the doctrine of equitable assignment beyond any of the decided cases, and, speaking for myself, I am not disposed to extend a doctrine, which, if carried to the length contended for, would necessarily have the effect of hampering the ordinary business transactions of life, and rendering it all but

impossible, as some learned Judge has remarked, for any one unacquainted with the rule of equity to know with whom he will have to reckon.

There is no doubt, upon the decided cases, that if a creditor gives an order upon his debtor to pay a sum in discharge of his debt, and that order is shewn to the debtor, it binds him, or, as stated by Lord Cottenham, that in equity an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, is a binding equitable assignment of so much of the fund.

Thus in *Ex parte South*, 3 Swanst. 392, the order was given by Jane Row to Alderson, her creditor, directed to the executor of a person indebted to Jane Row, and requiring the executor to pay *the debt* so owing to Jane Row to the creditor.

It is immaterial whether the debt proposed to be assigned is a debt due, or to become due, it is equally a debt although *solvendum in futuro*.

Lett v. Morris, 4 Sim. 607, is a case of that kind, where there was an order by a builder upon his customer and employer to pay his creditor out of the money which would become due under his contract.

Yeates v. Groves, 1 Ves. Junr. 280, was a case where there was an existing debt by a third person to the debtor, who gave his creditor an order to be paid from that source.

Crowfoot v. Gurney, 2 Moo. & Sc. 473, was also a case of an order directed to a debtor, and adopted and acted upon by him, to pay the amount due from him to a creditor of the party giving the order.

The principle to be deduced from all the cases does not appear to go beyond this, that an agreement between a debtor and a creditor, that the debt shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order, directing such person to pay such funds to the creditor, will create a valid equitable charge upon such fund, or, in other words,

will operate as an equitable assignment of the debt or fund to which the order relates.

It is clear that at the time the order was given and communicated to the defendants, Cross and Edwards, there was no such fund and no debt existing and due to Johnston, payable either in *præsenti* or *futuro*, and we were not referred to any case in which that rule had been held to extend to such a case as the present.

It was contended by the appellants, that, whether it would or would not have operated as an equitable assignment of the debt, which would have been created by a sale of the stock of goods in question upon a credit, no such contingency ever arose, Johnston having refused to complete a sale, except upon the terms, that the cash should be paid contemporaneously with the delivery.

It amounted therefore to this, that the appellants were debarred from entering into any contract whatever with Johnston, however advantageous they might consider that contract to be, because they had become aware of the order given to the plaintiffs

Mr. Gibbons contended that it was in the power of the appellants to enforce the sale of the stock by reason of the order, and the reference in it, coupled with the notice upon the doors of the store, "Stock sold to Cross and Edwards," if that would make any difference, but I think he could scarcely be serious in that contention; it was a mere proposal for a sale, and it is quite clear that Johnston was at liberty to have sold to any other person, either for the price then suggested, or on any other terms.

Reference was made to a case in this Court of *Mitchell v. Goodall*, but that was a very different case from the present. There Wood could not obtain the wheat, which was there in question, without payment or security, and if the defendant there had not entered into the undertaking which the plaintiff in that suit was attempting to make him fulfil, the wheat would never have reached the defendant's hands. It did reach his hands, and he sold it and held the money, when he received it, for the plaintiff, in pursuance of his undertaking.

If, at the time the order in the present case came to the notice of the defendants who are now appealing, they had been indebted to Johnston, it would have been their own folly to pay the money referred to in it to Johnston, but I do not see they were precluded from dealing with Johnston for ready money, and he intimated to them his refusal to deal upon any other terms.

There never was a fund upon which the order could operate, and I think, therefore, that the judgment below cannot be sustained, but should be reversed with costs, and this appeal allowed with costs.

OSLER, J. A.—This case is not one in which an assignment of property to be acquired *in futuro* is sought to be enforced against the assignor himself when the property has come into his hands, or the title to it has accrued. It is the case of an order upon a third person in respect of a fund, neither actually in being, nor about to arise in the ordinary course of events, out of any existing agreement or arrangement.

One of these conditions, or the other, according to all the authorities I have examined, is essential to constitute such an order a valid equitable assignment. If both of them are wanting, there is nothing actually or potentially in the hands of the person on whom it is given, which the assignor can control, or on which the order can operate; and where the person in whose favour it is given has no charge upon the property out of which anything corresponding to the fund afterwards arises, the latter must be subject to the conditions of the contract by which such fund is brought into existence: *Frith v. Forbes*, 4 D. F. & J. at p. 419; *Riccard v. Prichard*, 1 K. & J. 277; *Thomson v. Simpson*, L. R. 5 Ch. 659.

In the case before us, the order was given by the owner of the property on account of a debt not contracted on the faith of it—at a time when he had neither sold nor agreed to sell it to the defendants.

MEMORANDUM.

On the 6th day of December, 1885, the Honorable JOSEPH CURRAN MORRISON, one of the Justices of the Court of Appeal for Ontario, died at his residence, Woodlawn, Yonge Street, Toronto.*

* By 48 Vict. c. 13, s. 2 (O.) it is now provided that the permanent number of the Judges of the Court of Appeal, including the Chief Justice of Ontario, shall hereafter not exceed four, instead of five, as had been provided by 46 Vict. ch. 6, s. 2 (O.)

HATELY ET AL. V. THE MERCHANTS DESPATCH
TRANSPORTATION COMPANY ET AL.

Carriers—Bill of lading—Condition against liability.

The plaintiff agreed with the M. D. T. Co. for the conveyance of butter from London in Ontario to England.

The butter was carried from London to the Suspension Bridge by the G. W. Ry. Co., from the Bridge to New York by the N. Y. C. R. R. Co., and from New York to England by the G. W. Steamship Co., bills of lading being given at London to the plaintiff by a person who signed as agent severally and not jointly for the M. D. T. Co., the G. W. Ry. Co., and the G. W. Steamship Co.

The plaintiff sued for damage sustained by the butter, joining the three companies as defendants under the O.'J. A. sec. 91.

It appeared that the damage occurred while the butter was on a lighter of the N. Y. C. R. R. Co. in New York harbour, and before it was actually delivered at the pier or on board a vessel of the Steamship Co.

Held, that the M. D. T. Co. by virtue of its through contract was liable for the damage; that the responsibility of the Steamship Co. had not attached until after the damage was done, one of the terms of the bill of lading being that "this contract is executed and accomplished, and the liability of the G. W. Ry. and its connections as common carriers thereunder terminates on the delivery of the goods or property to the steamer or Steamship Company's pier at New York, where the responsibility of the Steamship Co. commences, and not before;" and that inasmuch as the butter had been received in England by the consignees without objection, the Steamship Company would have been protected by conditions which by the bill of lading were made part of the contract, one of which was to the same effect as the condition in question in *Moore v. Harris*, 1 App. Cas. 318.

Quære, by PATTERSON, J. A., if the M. D. T. Co. and the G. W. S. S. Co. could properly have been held jointly liable in this action.

The judgment of OSLER, J. A., 4 O. R. 723, as to the defendants the Merchants Despatch Company was affirmed.

AN appeal by the defendants the Merchants' Despatch Transportation Company from the judgment of Osler, J. A., at the trial, and an appeal by the defendants the Great Western Steamship Company, from the judgment of the Queen's Bench Division.

Both the judgments appealed from are reported 4 O. R. 723, where and in the present judgments the facts and arguments are fully stated.

The appeal was heard on the 9th of June, 1885.*

Millar, for the appellants, the Despatch Company.

Osler, Q. C., for the appellants, the Steamship Company.

**Present*—BURTON, PATTERSON, JJ.A., GALT and ROSE, JJ.

Moss, Q. C., and *Aylesworth*, for the respondents, the plaintiffs.

W. Cassels, Q. C., and *Holman*, for the respondents, the Railway Companies.

October 13, 1885. BURTON, J. A.—Upon the first trial of this action before myself, I was of opinion that the plaintiff could not recover, as the property in the goods had passed to the consignees, and it was not shewn that the plaintiff had either suffered or was liable to make good any loss that had been sustained by reason of the deterioration in the butter, and I had no power, even if such a course were proper, to add the consignees as plaintiffs without their consent.

As all the evidence which the plaintiff desired to offer was in, and the defendants had chosen to press and rely upon a nonsuit, I thought the Divisional Court would have dealt with the case upon that evidence, and if I was wrong have given judgment in favor of the plaintiff, but in place of doing so, the consignees were allowed to be added as plaintiffs upon their consent being obtained, and a new trial was ordered with that change in the record.

The propriety of that course is questioned by the Court of Appeal in England, in the case of *Walcott v. Lyons*, W. N., 25th April, 1885, p. 82, in which an order of Vice-Chancellor Bacon allowing an amendment by the addition of a plaintiff was reversed, the Court remarking that if the defence was good the plaintiff had no cause of action, and was trying to associate with himself some one who had; and if the defence was bad the presence of the other plaintiff was unnecessary. But whether the amendment was proper or the reverse it has been allowed, and although it may be difficult to see how A. and B., who have different interests, and in unequal amounts, are entitled to a joint verdict for a certain amount, no question of that kind is now before us.

The action was originally brought against the Grand Trunk Railway Company, the Merchants' Despatch Company, and the Great Western Steamship Company, and a

judgment was given on the last trial against all of them by Mr. Justice Osler, but the Grand Trunk has been relieved by the judgment of the Queen's Bench Division, whilst that against the Great Western Steamship Company was affirmed.

This appeal is against that judgment as far as it relates to the Steamship Company, and the Merchants' Despatch Transportation Company appeals direct from the judgment of Mr. Justice Osler.

The counsel for the Steamship Company contend that the responsibility of that company never attached, as the learned Judge has found as a fact (and it is one which can admit of very little doubt), that the injury occurred on the lighter, and he contends that until actual delivery on the Steamship Company's pier, or on the deck of the vessel, no responsibility arose, and that, if their liability did in truth commence when the butter was placed on the lighter, they are relieved under the conditions of the contract.

In this connection he contends that the further finding of fact of the learned Judge was erroneous, in holding the delivery on board the barge to be a delivery to them, and that it is inconsistent with the previous finding as to the Despatch Company, because, if it was the Steamship Company's barge, there was a complete delivery before the injury occurred.

I propose to deal with the latter of these objections, as it is unnecessary to consider the other question if it is made out that the company are relieved under the condition.

In dealing with this part of the case I am assuming that the evidence is sufficient to establish a contract between the Steamship Company and the plaintiff.

The bill of lading given to the plaintiff contains this memorandum in the body of it :

"The property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by the said steamships, or Steamship Company at the time of shipment," and the eighth condition indorsed on this bill of lading contains this stipulation :

“ The consignees, or the party applying for the goods, are to see that they get their right marks, and numbers, and after the lighterman or wharfinger, or the party applying for the goods has signed for the same, the ship is to be discharged from all responsibility for mis-delivery, or non-delivery, and from all claims under the bill of lading.”

The case of *Moore v. Harris*, 1 App. Cas. 318, is relied on as shewing that this condition was intended to relieve the shipowners from damages of every kind, but there is, I think, room for the contention that the language of the two conditions differs in an essential particular. The words of the condition in that case were unlimited and universal “ any claim whatever,” and I quite agree that where parties to a contract use such language it is not the province of a Court to say that they could not have meant what they have said ; but here they have not used such general terms, but after referring to their responsibility for mis-delivery, and non-delivery, for which, but for the condition, they would be liable under the bill of lading, they add, “ and for all claims under this bill of lading.” It does not strike me that negligence, which may, in a case like the present, be described as an omission to do something which it was the party’s duty to do, whether that duty arose under the bill of lading or otherwise, would be comprised in these words, and I am not prepared to say that if the defendants were guilty of negligence causing the loss they would be protected by them, although it is not necessary to decide the point, for if the liability of this company is under the through bill of lading signed by Brown professing to act as agent of the Steamship Company, then we cannot disregard the memorandum to which I have above referred, stating that the property covered by it is subject to all the conditions expressed in the customary forms of bills of lading in use by them at the time of the shipment, and when we refer to these we find not only a condition similar to No. 8, but one which is almost identical with that which was the subject of decision in *Moore v. Harris*, viz., “ the shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance, nor for any

claim, notice of which is not given before the removal of the goods."

I think that this language is not distinguishable from that in *Moore v. Harris*, and that it operates as a complete defence to the Steamship Company.

I see no reason for interfering with the decision against the Merchants' Despatch Transportation Company. Whether the telegrams and letters are to be regarded as a contract or as preliminary negotiations ending in the contract created by the through bill of lading, I think the result must be the same. Under the bill of lading their liability continued certainly until the goods were delivered to the Steamship Company, if not beyond; whether they have any legal claim against the Steamship Company for omitting to receive the goods when tendered at the wharf or not, is a matter for discussion between them and the Steamship Company; so far as this plaintiff is concerned they have established nothing to relieve themselves from liability.

I think, therefore, that as regards the Steamship Company we must allow the appeal, and I can see no reason for departing from what I think should be the general rule, of allowing it with costs, and dismissing the bill as against them, with costs.

The judgment against the Despatch Company should be affirmed, with costs.

The Grand Trunk Railway Company's rights were dealt with on the argument, when we were of opinion that they were not properly before us.

PATTERSON, J. A.—The plaintiff in his statement of claim alleges that the defendants are carriers of goods for hire: that on or about 23rd August, 1881, he delivered to the defendants 400 packages of butter at the city of London, in Ontario, to be by them safely and securely carried with reasonable speed to New York, and there shipped on a steamship to sail on 27th August, and delivered within a reasonable time to the plaintiff, 300 packages at Bristol, and 100 at Cardiff; and that the defendants received the

goods and undertook to carry them on the alleged terms. Then he avers that the defendants did not safely and securely carry the goods with reasonable speed, and within a reasonable time, nor ship the same upon such steamship by the time aforesaid, but detained the same for a long and unreasonable time, and neglected to take proper care thereof while in course of transportation, to the plaintiff's loss. And he further states that he brings this action in ignorance from which of the defendants he is entitled to recover.

Separate defences are pleaded by the Merchants' Despatch Company, the Great Western Railway Company, and the Great Western Steamship Company.

The Grand Trunk Railway Company, and the Great Western Railway Company, may for our present purposes be treated as the one company. The name of the former does not appear anywhere in the pleadings, but it does appear in some of the reasons for or against the several appeals, and the company was nominally represented, along with the Great Western Railway Company, before us, and apparently before the Divisional Court.

The statement of defence of the Merchants' Despatch Company denies the alleged contract, but submits that if that company made or ratified the contract, its terms are contained in a bill of lading, and the terms and conditions of that document are relied on. Then it sets out, as the actual dealing, that the Great Western Railway Company was to carry from London to the Suspension Bridge, the Merchants' Despatch Company from the Bridge to New York, and the Great Western Steamship Company from New York to Bristol and Cardiff. This, the defence alleges, was agreed upon between the defendants at the time the contract to carry was made, and the Merchants' Despatch Company received the butter from the Great Western Railway Company at the Suspension Bridge, and safely, securely, and with proper care and reasonable speed, carried it to New York, and then delivered it to the Great Western Steamship Company. The defence further asserts a claim to relief against the co-defendants of the Merchants' Des-

patch Company in the event of that company being held liable on the through contract.

Of the defence pleaded by the Great Western Railway Company it will be sufficient to say, briefly, that it asserts that the only engagement of that company was to carry, at the request of the Merchants' Despatch Company, to the Suspension Bridge, and there to deliver to the New York Central and Hudson River Railroad Company, which was done, and that the terms and conditions of the five bills of lading under which the butter was carried limited the liability of the company to the transit over its own line.

The defence of the Great Western Steamship Company denies any contract with the plaintiff, alleging a contract with the Merchants' Despatch Company to carry the butter from New York to Bristol; averring performance of that contract; and further claiming the protection of certain conditions indorsed on the steamship company's bill of lading, one of which, as set out, is that "the shipowner is not to be liable for any damage to any goods which is capable of being covered by insurance; nor for any claims of which notice is not given before the removal of the goods." Referring to a contract signed at London by one Brown, who assumed to act as agent for the three defendant companies severally, and not jointly, the defence, while denying that the Steamship Company authorized or ratified Brown's act, sets out certain conditions as contained in the document signed by Brown, one of which is that "the property covered by this bill of lading is subject to all the conditions expressed in the customary forms of bills of lading in use by said steamships or Steamship Company at time of shipment," those being the same conditions relied on in the earlier part of the defence. Another condition which is set out limits the responsibility for loss or damage to the company in whose custody the goods happen to be when the loss or damage occurs. Then these defendants say that any negligence that may have occasioned loss or damage to the butter was that of some other defendant, and they ask indemnity from such co-defendant, in the event of being held legally liable.

No question as between one defendant and another was tried, and we have merely to consider the liability of the defendants or any of them to the plaintiff.

The transaction began by telegraphic correspondence on 22nd August, 1881, between the plaintiff and Mr. Barr the Toronto agent of the Merchants' Despatch Company.

I shall read four telegrams of that date which relate entirely to the butter transaction, with the exception of an allusion in one to "Thorndale rate," which referred to another negotiation about a shipment of cheese.

"TORONTO, August 22, 1881.

"TO JOHN BARR.

"Will give you car butter, London—300 packages for Bristol—one for Cardiff. Will ship Tuesday for Saturday's steamer at 63 cents. Say quick if you accept, and if you can get it through.

"W. C. HATELY."

"August 22, 1881.

"TO W. C. HATELY.

"Sixty-four best can do—steamers 27th—if they will take it. Answer, and will wire New York to place.

"JOHN BARR."

"August 22, 1881.

"TO JOHN BARR.

"Your list says steamers Bristol and Cardiff Saturday. Will ship butter to-morrow for them at rate you name. Accept Thorndale rate—advise London and Thorndale.

"W. C. HATELY."

"August 22, 1881.

"TO W. C. HATELY.

"Ship your London butter *via* Great Western; you can get refrigerators there. I have advised Western.

"JOHN BARR."

The intention at this date was to send the butter going to Bristol by the Great Western Line of Steamships, and that going to Cardiff by the Edwards' Line, but it was afterwards found necessary to send it all by the former line.

Having, in the telegram just read, directed the plaintiff to ship at London *via* the Great Western Railway, Mr. Barr on the same day appears to have written to Mr. Spriggs the general freight agent of that company at Hamilton, and to have telegraphed to him the following day. The letter and the telegram are as follows:

" MERCHANTS' DESPATCH TRANSPORTATION Co.—ADVICE OF CONTRACT.

" TORONTO, Ont., Aug. 22nd, 1881.

" DEAR SIR,—I have contracted with W. C. Hately, of Brantford, for one car butter each from London to Bristol and Cardiff *via* New York and Great Western *via* Edwards. Contract 64c. divisions, G. W. R. 10.56.

" Yours truly,

G.B.S.

" JNO. BARR."

" TORONTO, August 23, 1881.

" G.B.S.

" 99. Hately shipping car each butter, Bristol and Cardiff, Ex. London ; thro. sixty-four (64) Bristol, G. W. Line—Cardiff, Edwards : please advise agent.

" JOHN BARR."

Then we have a request note from the plaintiff, signed for him by Heath & Fennimore, his shipping agents at London, dated 23rd August, 1881, requesting the Great Western Railway Company to receive the undermentioned property to be sent by the company, subject to their tariff, and to terms and conditions stated, which were agreed to by this shipping note delivered to the company as the basis upon which their receipt was to be given for the property. After the description of the 300 packages for Bristol there is this note : " By Merchants' Despatch Company to New York, and Great Western Line Steamers to Bristol, 5291. M. D. T. car 2872. To be iced at Bridge." It is not necessary, at present, to notice the conditions.

There is a similar request note with regard to the 100 packages for Cardiff, the " Edwards Line of Steamers to Cardiff" being named in place of the " Great Western Line of Steamers to Bristol." No receipt was given for the goods other than as contained in the bills of lading.

Four bills of lading were given for the Bristol consignment, at London, one being for 150 packages, and the other three each for fifty packages ; they were all in the same form, beginning thus :

" FOREIGN BILL OF LADING.

" GREAT WESTERN RAILWAY,

" Merchants' Despatch Transportation Company, and the Great Western Line of Steamships from New York. From London, Ont., to Bristol, England.

" Shipped, in apparent good order, by W. C. Hately, the packages, property or articles marked, numbered, and specified as below. Contents,

gauge, value, and condition of contents unknown. Weights subject to correction.

“Through rate 64c. gold per 100 lbs. Gross weight 9639 lbs.

“The property covered by this Bill of Lading is subject to all the conditions expressed in the customary forms of Bills of Lading in use by said steamships or steamship company at time of shipment.

MARKS AND NUMBERS.	MERCHANDISE.
One hundred and fifty (150).	Packages of butter.
P. 1 Top.	Iceing to be charged forward.
P. Side.	
Car 2872, M. D. T.	

“To be delivered in like good order and condition unto order, or to his assigns, he or they paying freight, in cash, immediately on landing the goods, without any allowance of credit or discount, at the rate of gross weight delivered, with average accustomed (at \$4.80 to the pound sterling), under the following terms and conditions,” viz :

Among the other conditions the following may be noted :

“(3) It is further agreed, that the said Great Western Railway, and its connections, shall not be held accountable for any damage or deficiency in packages after the same have been receipted for in good order by consignees, or their agents, at or by the next carrier beyond the point to which this bill of lading contracts. Consignees are to pay freight and charges upon the goods or merchandise in lots or parts of lots as they may be delivered to them.

“(4) It is further stipulated and agreed, that in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of the happening of such loss, detriment, or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods.

“(6) It is further agreed, that the said Great Western Railway, and its connections, have liberty to forward the goods or property to port of destination by any other steamer or steamship company than that named hereon ; and this contract is executed and accomplished, and the liability of the Great Western Railway, and its connections, as common carriers thereunder, terminates on the delivery of the goods or property to the steamer or steamship company's pier at New York, when the responsibility of the steamship company commences, and not before.

“(7) And it is further agreed, that the property shall be transported from the Port of New York to the Port of Bristol by the said steamship company, with liberty to ship by any other steamship or steamship company, subject to the following terms and conditions, viz. :

“(8) * * The consignees, or the party applying for the goods, are to see that they get their right marks and numbers, and after the lighterman or wharfinger, or the party applying for the goods, has signed for the same, the ship is to be discharged from all responsibility for mis-delivery or non-delivery, and from all claims under this bill of lading.”

There was a similar bill of lading for the 100 packages for Cardiff, but with the name of the “Edwards Line” in place of that of the “Great Western Line.”

Each of the five bills of lading concluded as follows :

“In witness whereof, the agent signing for the said Great Western Railway, its connections and steamship companies, hath affirmed to two bills of lading, of this tenor and date, one of which being accomplished, the others to stand void.

“WILLIAM BROWN,

“*Agent severally but not jointly.*”

Dated in London, August 23, 1881.

The butter was shipped in cars of the Merchants' Despatch Company. It left London on the evening of 23rd August, and must have arrived at the Suspension Bridge before daylight on the 24th. There was then some delay, owing to a question about the divisions of the through rate among the different carriers, and the butter did not leave for New York till the afternoon of the 25th, in consequence of which it did not reach New York until the morning of Sunday the 28th. This delay does not appear to have led to the injury to the butter, unless possibly in an indirect way by causing it to miss the steamer of the 27th for which it had been intended, because the car containing it was properly iced, and while in the car it was protected from the heat of the weather.

It is made quite clear that the injury was caused by the heat while the butter was upon a lighter in New York harbor, and the question is, whether all or any one, and which of the defendant companies are responsible to the plaintiff for that damage.

The evidence given by Mr. Morgan, the agent of the Steamship Company, is also against the idea of concert or ratification. He does, indeed, say that his company carried forward the goods under the bills of lading of the 23rd of August, acting under the contract made with the Merchants' Despatch Company by those bills of lading. He does not treat the contract as one with the plaintiff. He says it was made on change, and was witnessed by a slip that was produced at the trial. That paper is headed "Merchants' Despatch Transportation Company, Contract No. 2313. Memorandum of freight engagement Great Western Line." It is dated New York, August 23, 1881, and signed "W. H. McIlhanney, General Foreign Freight Agent;" and it mentions 27s. 6d. as the rate for the butter to Bristol.

We are not furnished with the means of knowing to what extent the share of the 64 cents through freight intended by Mr. Barr for the Steamship Company corresponded with the 27s. 6d.; but we know that the 64 cents rate was arranged on the 22nd, the day before the transaction on change, and on the 24th it would seem that the 27s. 6d. had been refused and 30s. demanded and conceded.

It is impossible to find in this evidence any sufficient reason for seriously doubting the propriety of holding the Merchants' Despatch Company liable on the through contract.

If there were any conditions in the bills of lading or elsewhere which could be relied on to relieve that company from responsibility to the plaintiff for the damage to his goods, it might be important to consider whether the contract was completed on the 22nd of August by the telegraphic correspondence, and so was an unconditional contract, or whether all that was done on that day was to arrange the rate on which a more formal contract, such as is usually embodied in a bill of lading, was to be prepared. The latter would probably be the correct conclusion, understanding, as we do, that the Despatch Company was the contractor to carry the goods, and not merely the agent to contract with the actual carriers.

But there is no condition on which the Despatch Company can rely, and indeed none which is not in its terms confined either to the Great Western Railway Company and its connections, or to the Steamship Company. The term "connections" as I have already mentioned, is explained to mean the New York Central Railroad Company with whose line that of the Great Western connects, and with whom the evidence clearly shews the division of the sixty-four cents was made.

We cannot, in my opinion, hold the Great Western Steamship Company liable to the plaintiff.

I think the proper conclusion as to the contract of that company is, that it was a contract with the Merchants' Despatch Company, and not with the plaintiff.

I see no satisfactory ground, either in fact or in law, for holding that those two companies were joint contractors for the carriage of the goods across the ocean.

I have referred to some parts of the evidence which seem to support the view that the undertaking to carry at sixty-four cents per 100 pounds, from London in Ontario to the British ports was made without concert with, and was not ratified by the Steamship Company. It is true that the ocean freight was paid out of the sixty-four cents, but that was under terms to which the Despatch Company was forced to submit in order to fulfil its contract with the plaintiff, and which terms were not anticipated when the contract with the plaintiff was made. This bears on the question of fact, as does also the circumstance, whatever its value may be, that the bill of lading is signed "severally and not jointly."

The legal proposition which asserts a joint liability on a contract like the one in question strikes me as something unusual, and one which would require to be very clearly made out.

Nor do I perceive any stronger grounds for treating the two companies as joint tort feasons, or for holding one liable in contract and the other in tort, if liability in that form was asserted, which has not been done.

I need not elaborate this part of the argument, because in my opinion there are two other grounds, either of which must be fatal to the plaintiff's claim against the Steamship Company.

The alleged liability to the plaintiff is rested entirely on the contract embodied in the bill of lading. That document begins by the distinct announcement that the property it covers is subject to all the conditions expressed in the customary forms of bills of lading in use by the Steamship Company at the time of shipment. What these are is a matter for proof, and they have been proved to contain the same condition which in *Moore v. Harris*, 1 App. Cas. 318, was held by the Judicial Committee of the Privy Council to protect the ship owner from a claim for damage sustained by goods during the voyage, because the claim had not been made before the goods were removed by the consignee at the end of the transit.

This is a direct authority in favour of the Steamship Company under the circumstances of the present case. There is another condition contained in the body of the bill of lading signed at London which declared that "the consignees, or the party applying for the goods, are to see that they get their right marks and numbers, and after the lighterman, or wharfinger, or party applying for the goods has signed for the same, the ship is to be discharged from all responsibility for mis-delivery, or non-delivery, and from all claims under this bill of lading."

A difference of opinion existed in the Divisional Court as to the construction of this condition, His Lordship the Chief Justice considering that the general language with which it concludes was restricted by the foregoing specific reference to a particular class of breaches of the carrier's duty, while Mr. Justice Cameron was of opinion that it came within the principle of *Moore v. Harris*, and was in effect equivalent to the condition there pronounced upon. Mr. Justice Armour rested his judgment on other grounds, and made no allusion to the conditions.

For my own part I think I should, if it were essential to form a decided opinion on the subject, struggle to support the view taken by the Chief Justice, which commends itself to my judgment as more in accord with what an ordinary consignor would be likely to understand by the language, while it must be admitted that the principle of the decision in *Moore v. Harris* would seem to justify the reading of this condition which gives to the general words an effect unrestrained by the particular ones, which effect, if intended by the draftsman, would, by covering all the ground, have rendered the particular words unnecessary. But, inasmuch as the *Moore v. Harris* condition applies, and under that authority clearly protects the Steamship Company, it is not necessary to discuss the other.

The other ground depends upon a question of fact, namely, whether the goods were damaged while in charge of the Steamship Company, or before that company's responsibility began.

I think the latter was the case. The butter was taken from the iced car of the Merchants' Despatch Company on the siding of the New York Central Railroad, and placed on a lighter, on Monday, 29th August, and it remained on the lighter until the 3rd of September. The injury was occasioned by the heat of weather during that interval.

I do not agree with the conclusion that it was during any part of that time in charge of the Steamship Company, within the terms of the contract contained in the bill of lading.

The words of condition No. 6 are, that "this contract is executed and accomplished, and the liability of the Great Western Railway and its connections as common carriers thereunder terminates, on the delivery of the goods or property to the steamer or Steamship Company's pier at New York, when the responsibility of the Steamship Company commences and not before."

The practice is shewn to be for some officer of the Steamship Company to issue a "permit" or signification of readiness to receive freight; thereupon the freight is sent

by the Railroad Company in one of its lighters to the steamship, and delivered either on the vessel or on the pier. There is a dispute in this case as to whether a permit was ever issued. The railroad people cannot produce one, and there is no counterfoil in the book at the steamship's office, which ought to contain one if a permit was issued. Still it is proved that Mr. McIlhanney promptly asked for a permit when the goods arrived at New York, and that an order was issued from his office, on 29th August, to the railroad officials to deliver the butter to the steamer *Dorset*. That order, it is sworn, would not have been given unless a permit were received; and Mr. Saphel, the clerk who made out the order, deposes that he had the permit. The existence of the permit is found as a fact. It happens that the lighterman could not get to the pier 18, which was that of the Steamship Company, by reason of other lighters engaged in unloading the *Dorset*; and, because he was blocking the way, the stevedore employed in unloading the *Dorset* towed the lighter across to Brooklyn, speaking of its staying there three or four hours, but afterwards directing its captain to stay there till sent for; and at length, but not until 3rd September, sent the tug for him, and towed the lighter to pier 18, where the butter was transferred to the steamer *Bristol*, the *Dorset* having on the 3rd of September sailed without it.

The lighter belonged to the railroad company whose province it was to deliver the butter to the steamer, and it was ultimately, on 3rd September, unloaded by the railroad men, and a receipt was then given for the goods by the receiving clerk of the Steamship Company.

Now, it seems to me very clear that until this 3rd day of September the goods were not delivered to the steamer or Steamship Company's pier. The action of the stevedore in removing the barge, or to put it more strongly than perhaps the evidence would warrant, the refusal of the company to receive the goods when tendered at the pier, cannot, in my judgment, be treated as equivalent to the

delivery on which the two events depended—the fulfilment of the Railroad Company's undertaking, and the commencement of the Steamship Company's responsibility. The action or refusal of the Steamship Company may or may not have furnished an actionable ground of complaint to the Merchants' Despatch Company, but we are not now required to try any question between the defendant companies, notwithstanding that such questions are suggested in the pleadings.

The goods remained in the actual possession of the servants of the Railroad Company, and upon the barge belonging to that company; and when the Steamship Company at length made room for them upon the pier, they had to be unloaded, or in the words of the bill of lading, had to be "*delivered* to the steamer or the steamship company's pier" by the servants of the Railroad Company.

On this ground I am of opinion that, assuming the bill of lading to evidence a contract between the Steamship Company and the plaintiff, the liability of the company never attached, nor was that of the previous carrier discharged, until after the injury had accrued.

I think, therefore, that the action ought to have been dismissed with costs as against all the defendants except the Merchants' Despatch Company, and that, as against that company, the plaintiff ought to have had judgment for his damages and costs.

I have treated the case throughout without any reference to the questions concerning the joinder of the indorsees of the bill of lading, as nothing turns at present upon those questions, except so far as the costs of the first trial are concerned. In my opinion, the costs of that trial should be treated as part of the costs in the action, to be dealt with as I have just indicated.

The judgment at the trial was against all the defendants jointly.

Against that judgment the Merchants' Despatch Company appealed directly to this Court, and the steamship company and the railway companies moved in the Divisional Court.

The Divisional Court set aside the judgment as against the Railway Companies without costs, and dismissed the application of the Steamship Company with costs, and thereupon the Steamship Company appealed to this Court.

The appeal of the Steamship Company should be allowed, with costs against the plaintiff.

The appeal of the Merchants' Despatch Company should be dismissed with costs.

One matter of detail in the formal judgment against that company is complained of, that is, the award against the company of the costs occasioned by making the said defendants, the Great Western Railway Company and the Grand Trunk Railway Company party defendants, and by adding the party plaintiffs.

I do not find anything in the materials before us to explain when or why the Railway Companies were made defendants. They seem to have been parties when the defence of the Despatch Company was filed, and I should suppose also when the statement of claim was filed. We may not be able to surmise correctly the reason for making the other defendants pay the costs incurred by the plaintiff in adding these defendants after action begun, in place of joining them originally, but in the absence of information on that subject, and having regard to the fact that in the defence of the Despatch Company relief is asked against the Railway Companies, I do not think we are in a position to criticise this adjudication of costs. The consignees were added as plaintiffs, obviously in pursuance of the permission given by the Court when the nonsuit, which had been moved by the Despatch Company on the ground of the absence of the consignees, was set aside, although the Court did not decide that they were necessary parties, 2 O. R. 392. The same Court has considered that the Despatch Company ought to pay the costs of adding them, and no good reason has been shewn why we should interfere with that exercise of discretion.

The Railway Companies are not before us as either appellants or respondents, so far as I can understand their

position. They must pay their own costs of their appearance here.

GALT, J.—This is an appeal so far as the Merchants' Despatch Company is concerned from the judgment of Osler, J. A., before whom the case was tried without a jury, and as respects the other defendants from the judgment of the Queen's Bench Division. I shall consider these cases in their order.

1st. As to the Merchants' Despatch Company: The learned judge held that "as against the Merchants' Despatch Company the plaintiffs are entitled to recover. The contract with them is evidenced, as I think, by the four telegrams of the 22nd August, which passed between the plaintiff and John Barr, who I find as a fact was the agent of these defendants, duly authorised to make such a contract. I think the defendants by that contract agreed that the butter should go by a ship sailing on the 27th August, so far as that is material." I fully concur in the above judgment, nor was it in fact arraigned in the argument before us, the contention of Mr. Millar being that the other defendants were equally liable, not that the Despatch Company were exonerated except so far as that they had delivered the butter in good order to the defendants, The Great Western Steamship Company at New York. The case of *Carr v. The West Cornwall R. W. Co.*, 2 H. & N. 703, is directly opposed to this view, in which it was held that under circumstances very similar to those now before us (although not by any means so strong against the defendants) a jury might *infer* a contract to carry the whole distance, and consequently they were liable for the damage to the goods. The contract with these defendants was absolute as shewn by the telegraphic correspondence to carry the butter from London, Ontario, 300 packages for Bristol, 100 for Cardiff. This appeal is therefore dismissed, with costs.

As to the Great Western and Grand Trunk Railway Companies, the judgment of the Divisional Court is in their

favor as respects the plaintiff's claim, but under the peculiar circumstances, without costs. I fail to see how they are in any way interested in this appeal, the sixth reason of appeal by the Merchants' Despatch Company does not apply to them in any way, the reason given is that the decision should be varied, "as to the disposition of the costs, there being no sound reason for ordering these defendants to pay the plaintiff's costs occasioned by making the Great Western Railway Company and Grand Trunk Railway Company of Canada parties." This has no reference to them, it was a question between the plaintiff and the appellants in which the railway companies were not interested. The companies now come before the court nominally as respondents, but in reality as appellants, as respects the question of costs, and as they have not placed themselves in the position of appellants, as pointed out by my brother Rose, I think their appeal should be dismissed, and they should pay their own costs.

As respects the Great Western Steamship Company we are not called upon to express any opinion as to the liability of the different defendants between themselves, as they expressly refused to enter into that question at the trial. I have already stated that in my opinion the contract made with the Merchants' Despatch Company was that under which the butter now in question was to be carried from London to Bristol and Cardiff independently of any arrangements made by that company with the different lines of carriers whether by rail or by water. I therefore think these defendants are not liable, but I agree, with Cameron, C.J., in the opinion expressed by him that under the circumstances they should not recover costs against the plaintiff. Their appeal is allowed, but without costs.

ROSE, J.—Without determining what the fact may be I assume in the plaintiff's favor as against the Steamship Company that the bill of lading dated the 25th of August, 1881, evidences the contract with that company ;

that the butter was delivered at its pier and was delivered to the company, and by reason of not placing it on board the "Dorset" the damage was caused, and therefore that the loss was occasioned by the default of that company.

The bill of lading states that the butter was "shipped in apparent good order" and was "to be delivered in like good order and condition unto order or to his assigns." It was not delivered in good order and condition.

This being so I agree with my learned brother, the Chief Justice of the Common Pleas Division, then a member of the court, whose decision is appealed from, that condition 8 of the bill of lading applies, and that the plaintiff's claim is a claim under the bill of lading.

A declaration or statement of claim setting up a claim for non-delivery "in like good order and condition" would, I think, be well supported by the facts in this case as above assumed.

I find it unnecessary therefore to consider the view adopted by my learned brother Burton as to the introduction of the condition expressed in the customary forms of bills of lading. If it is to be introduced into the bill of lading, and its introduction narrows the effect of the language of the 8th condition, then, within its broader provisions, the Steamship Company will probably find a more secure refuge. Certainly under one or other or both of these conditions the Steamship Company is, in my opinion, relieved, and its appeal should be allowed with costs.

I am unable to agree that because that company strenuously opposed being fixed with a liability against which it had protected itself by express contract, or because the plaintiff has suffered, therefore the company should be deprived of its costs.

As to costs in a case of hardship *Caton v. Caton*, L. R., 2 H. L. Cas. 127 at 146-8, may be referred to.

As to the appeal of the Merchants' Despatch Company: The terms of the contract seem to me to be clear. That

company bound itself to deliver the butter in good order and condition, or that it would be so delivered and did not protect itself by any conditions which can relieve it from liability for breach of that agreement.

Mr. Millar argued that it was one of the connections of the Great Western Railway Company, *i.e.*, was in fact the New York Central Railroad. This appears not to be so as a matter of fact, for it is a separate and distinct corporation, although it may be under the same control. If it be the carrier between the Suspension Bridge and New York, it would become necessary more carefully to consider whether the butter had been delivered to the Steamship Company before it was injured. I do not desire to question the finding to that effect. I have not found it necessary to form an opinion on the question.

It seems to me therefore that whether the contract with the Despatch Company is evidenced by the telegrams as held by my learned brother Galt, or by the bill of lading, that company undertook to have the butter carried to and delivered in good order and condition in England, and has broken its contract. Its appeal must be dismissed, with costs.

The order of the Divisional Court dismissing the action as against the Great Western Railway Company without costs has not been appealed against.

That company, however, seeks to have that order varied without appealing, and to effect this serves what purport to be reasons against the appeals of the Despatch Company and the Steamship Company, in which it admits that no relief is asked against it, and that it seeks no relief against the appellants, but submits the order of the Court below should be varied by giving costs to it to be paid by the plaintiff.

In my opinion if the Great Western Railway Company desired to vary the order of the Divisional Court, it should have separately appealed against such order in the usual form, giving security, &c., and not having done so is not in a position to ask to have the order varied.

It therefore does not become necessary to consider the powers of this Court to allow an appeal on the mere question of costs.

In *The City of Manchester*, 5 Pro. D. 221, in the Court of Appeal, James, L. J., said: (p. 222) "Where costs are given with regard to the conduct of the parties there is no appeal, but where a general rule is laid down and costs given according to it, an appeal will lie."

I desire to express no opinion on the question as I do not think it is under review.

As the Great Western Railway Company comes asking for costs which it has not put itself in a position to obtain, even if entitled to them, it must, I think, bear its own costs of the appeal. I do not see that its action has increased the costs to any of the parties. If so it should, I think, pay such costs. The Master may inquire as to this.

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MCKELLAR ET AL. V. MCGIBBON.

*Bill of sale—Registration—Attempt to take possession—R. S. O.
ch. 119.*

The defendant seized goods in the possession of McL. under an execution against him; and the plaintiffs, the Bank of M., claimed the goods as assignees under an unregistered bill of sale given by McL. to one F., as collateral security for indebtedness. There was no change of possession. Afterwards McL. agreed with the Bank to hold the goods as tenant at will at a rental, and subsequently the Bank made an ineffectual attempt to take possession.

Held [reversing the judgment of the County Court of Lambton], that the attempt to take possession of the goods was not sufficient to satisfy R. S. O. ch. 119, and that the defendant was therefore entitled to succeed.

Parkes v. St. George, 10 A. R. 496, distinguished.

THIS was an appeal by the defendant from the judgment of the Judge of the County Court of the county of Lambton, on an interpleader issue tried by him without a jury.

The defendant was an execution creditor of one Hector McLeish.

On the 12th February, 1881, McLeish gave a bill of sale, covering the property in question, to one Thomas Fawcett, as collateral security for payment of certain notes discounted for him by Fawcett.

The bill of sale was not registered, and the property remained in the use and actual possession of McLeish.

The notes, or the renewals thereof, were afterwards transferred by Fawcett to the plaintiffs, the Bank of Montreal, and on the 27th September, 1884, the notes being still current, Fawcett, by deed indorsed on the bill of sale, for valuable consideration, assigned and transferred to

ing and having possession before an execution or attachment issued, he could hold the goods notwithstanding non-registration of, or other merely formal defect in the conveyance. But the Act gives him no right against creditors, merely because, in the language of Mellish, L. J., in *Ex parte Jay*, L. R. 9 Ch. 697, he has used due diligence, and endeavoured to obtain the goods. If, in point of fact, his security has not been registered, or he has not obtained possession of the goods, and has not taken them out of the actual possession of the grantor or mortgagor, the statute applies, and the sale or mortgage is void against the execution creditors.

I think, therefore, that the appeal should be allowed.

HAGARTY, C. J. O., and PATTERSON, J. A., concurred.

Appeal allowed.

IN RE CHISHOLM AND THE CORPORATION OF THE
TOWN OF OAKVILLE.

*Prohibition to County Judge—Amending registered plan—Status of
applicant—Owner—Assign—R. S. O. ch. 111, sec. 84.*

Held, [reversing the judgment of PROUDFOOT, J., 9 O. R. 274] that the status of C., as a person, or the assignee of a person, who registered a plan, was a question of law and fact combined for the County Judge to determine upon C.'s application to him, under R. S. O. ch. 111, sec. 84, to amend the plan, and that his decision was not examinable in prohibition.

Seemle, a person not the owner of the property may register a plan, and although this would be at the time a futile proceeding, yet if he afterwards became the owner of the property and adopted the plan, he would be entitled under the Act to have it amended.

Appeal by Robert Kerr Chisholm from the judgment of Mr. Justice Proudfoot (9 O. R. 274) directing a writ of prohibition to issue to the Judge of the County Court of the county of Halton.

The proceeding, to restrain which the writ of prohibition in this matter was granted, was taken under section 84 of the Registry Act, R. S. O. ch. 111, by Robert Kerr Chisholm, the appellant, on whose behalf an appointment was obtained from the Judge of the County Court of the county of Halton on the 25th of November, 1884, to consider the matter of an application by him to amend the registered plan of the town of Oakville, filed in the Registry Office for the county of Halton on the 12th of January, 1850, by Geo. R. Chisholm, John K. Chisholm, and Robert K. Chisholm, executors of the late Wm. Chisholm, by closing up that portion of Water street lying to the south of King street, as shewn on the said plan.

The appointment was served upon the council of the corporation of Oakville, who opposed the application before the Judge, and, pending his decision, moved for and obtained the order for prohibition which is the subject of this appeal.

From the papers filed on the motion the following facts appeared :

On the 25th of March, 1831, a patent from the crown issued to the late William Chisholm, father of the appellant, for, among other lands, lot No. 14, concession 4, south of Dundas street, township of Trafalgar, on which lot the portion of Water street in question is situate.

On the 10th July, 1832, William Chisholm mortgaged 960 acres of the land comprised in the patent, including lot No. 14, to Forsyth & Co.

On the 7th March, 1836, he released his equity of redemption to the mortgagees.

On the 27th of May, 1852, the then owners of the land, who appeared to be the surviving mortgagees and the representatives of one who had died, by indenture, reciting the mortgage and release "and other] matters therein set forth," conveyed to the appellant and one Thompson Smith all the residue of the said lands remaining unsold at the date of said indenture. This deed was not produced. The lands appear to be described, as in the patent from the Crown, without any reference to a plan, and include the lot on which Water street is laid out.

On the 1st January, 1857, Thompson Smith conveyed all his interest in the lands to the appellant by the same description.

In addition to the lands mortgaged to Forsyth & Co., William Chisholm was the owner of a block of land adjacent thereto, said to be the original town plot of Oakville, as designated and established by him, and part of which was still his property at the time of his death.

No plan of this block was ever filed by him, but he had sold portions of it pursuant to a plan made by R. W. Kerr, P. L. S., dated 1st August, 1836. This plan embraced part of the lands, including lot 14, which had then been acquired by Forsyth & Co., under the mortgage and release already mentioned, and is the map on which Water street is laid down.

On the 12th January, 1850, Chisholm's executors, of whom the appellant is one, caused this plan to be filed in the registry office of the county of Halton, pursuant to 12

Vict. ch. 35, sec. 42, (1849), by which the original owner, or the heirs or other representatives of the original owner, of lands forming the site of any town or village, were required, within one year after the passing of the Act, to deposit a plan of the survey thereof in the county registry office.

After the appellant had acquired his title he made conveyances of some parts of the lands, describing such parts as they were laid down and described on this plan.

The part of Water street as to which it was sought to amend the plan had never been opened or used as a street.

The appeal was heard on the 26th of October, 1885.*

Moss, Q. C., for the appellant.

Lash, Q. C., for the respondents.

November 24, 1885. OSLER, J. A.—The disposition of this appeal appears to me to depend rather upon the answer to be given to the inquiry: What was the nature of the jurisdiction which the Judge of the County Court was exercising? than upon any opinion we may form as to the status of the appellant to make the application complained of. If we should think he had such status, then, *ex concessis*, the county Judge had jurisdiction, but the question is, on a motion for prohibition, whether that was not a matter which he was himself competent and bound to decide?

The 84th section of the Act enacts:

“In no case shall any plan or survey, although filed and registered, be binding on the person so filing or registering the same, or upon any other person, unless a sale has been made according to such plan or survey, and in all cases amendments or alterations of any such plan or survey may be ordered to be made, at the instance of the person filing or registering the same or his assigns, by the Court of Queen’s Bench or Common Pleas, or by the Court of Chancery, or by any Judge of any of the said Courts, or by the Judge of the County Court of the county in which the lands lie, if on

* *Present*:—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

application for the purpose duly made, and upon hearing all parties concerned, it be thought fit and just so to order, and upon such terms and conditions as to costs and otherwise as may be deemed expedient."

The jurisdiction thus conferred upon the Judge of the County Court to order the amendment of a plan is precisely the same as that conferred upon the several divisions of the High Court and the individual Judges thereof. All of these tribunals stand on the same footing as regards general jurisdiction over the subject matter, which is the making of such an order in a proper case.

This point, if discussed in the Court below, is not noticed in the judgment, which proceeds altogether on the ground, that, in the view taken by the court of the evidence and of the proper construction of the Act, the appellant is not "an assign" of Col. Chisholm, the person by whom the plan was made, because that plan did not bind Forsyth & Co., through whom the appellant claims by a title prior and paramount to it.

Laying aside this question for the present, I think the authorities conclusively shew that the appellant's status, as a person who had registered the plan, or the assign of a person who had done so, was a question of law and fact combined, for the county Judge—just as it would have been for the High Court or a Judge of that Court—to determine in the course of the inquiry, and that his decision is not examinable in prohibition.

The judgment of the Judicial Committee of the Privy Council in *The Colonial Bank of Australasia v. Willan*, L. R. 5 P. C. 417, contains an instructive discussion of the authorities and a clear statement of the law on this subject.

An Act of the Colony of Victoria, the Mining Companies Limited Liability Act, 1864, provided that whenever any creditor to whom any company, registered under the Act, should be indebted in a sum exceeding £50 then due, had served on the company a demand for payment of such sum, and the company had neglected

for three weeks to pay it, or to secure it to the creditor's satisfaction, it should be deemed unable to pay its debts, and any such creditor might make application for winding up the company to the Judge of the Court of Mines of the district wherein the company was registered. The Judge was empowered to dismiss the application or to make an order for winding up the company forthwith, or after default of payment of the debt on a day to be named.

Under these provisions a winding-up order was made by the Judge of a Court of Mines, at the instance of the Colonial Bank, against a company registered under the Act. The Supreme Court of the Colony made absolute a rule *nisi* to quash such order, on the ground that the Judge had acted without jurisdiction in making it, there being then, as they held, no debt really due by the company to the bank. The latter appealed to the Privy Council, contending that the Judge of the Court of Mines had authority to try the fact of debt or no debt, and that his finding gave jurisdiction to the court, even if it was an erroneous finding.

The decision of the Supreme Court was reversed. On the point of want of jurisdiction in the Judge, Sir James W. Colvile, who delivered the judgment of the Judicial Committee, said :

"In order to determine this it is necessary to have a clear apprehension of what is meant by the term 'want of jurisdiction.' There must, of course, be certain conditions on which the right of every tribunal of limited jurisdiction to exercise that jurisdiction depends. But those conditions may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon facts or a fact to be adjudicated upon in the course of the inquiry. It is obvious that conditions of the last differ materially from those of the three other classes. Objections founded on the personal incompetency of the Judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face

of the proceedings or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the Judge has erroneously found a fact, which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry, but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of appeal, and the power to re-try a question which the Judge was competent to decide. Accordingly, the authorities, of which *Reg. v. Bolton*, 1 Q. B. 66, and *Reg. v. St. Olave*, 8 E. & B. 528, may be taken as examples, establish that an adjudication by a Judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court will not on *certiorari* quash such an adjudication on the ground that any such fact, however essential, has been erroneously found."

It is then pointed out that there is another class of cases, "in which the Judge of the inferior Court, having legitimately commenced the inquiry, is met by some fact which, if established, would oust his jurisdiction, and place the subject-matter of the inquiry beyond it. To this category belong such cases as *Thomson v. Ingham*, 14 Q. B. 710; *Pease v. Clayton*, 3 B. & S. 620, and *Reg. v. Stimpson*, 4 B. & S. 301. In all these cases the inferior Court, being incompetent to try a question of title, was bound to hold its hand when a *bonâ fide* dispute as to title arose before it."

Bunbury v. Fuller, 9 Ex. 111, is referred to as giving the general rule in such a case, namely, that "no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point *collateral* to the merits of the case upon which the limit to its jurisdiction depends."

It was held that the case then before the Judicial Committee was governed by *Reg. v. Bolton* and that class of cases.

"The order, was one made by a competent Judge; shewing, on the face of it, that every requirement of the statute under which it was made had been complied with; ordering that which the Judge, on proper grounds, had authority to order; and containing an express

adjudication upon a fact which, though essential to the order, the Judge was both competent and bound to decide, viz., that the sum claimed to be due to the petitioning creditors was then due to them from the mining company. * * This being so, it seems to follow that the Supreme Court could only arrive at the opposite conclusion upon a retrial of the question of the petitioning creditors' debt. * * To do this, and to quash the order upon a conclusion thus drawn, is clearly contrary to the principles established by *Reg. v Bolton* and that class of cases."

The case of *Re Bowen*, reported (only) in 15 Jur. Q. B. 1196, cited by Mr. Moss, is also in point. There the motion was for prohibition to restrain the Judge of the Court of Bankruptcy from granting the bankrupt an order of protection under section 1 of stat. 5 & 6 Vict. ch. 116, which provides that any person being a trader and "owing debts amounting in the whole to less than £300" may present a petition for protection to the Court of Bankruptcy, which the Judge is empowered to grant. The question was, whether the Judge's decision as to the amount of the petitioners' indebtedness could be inquired into. Campbell, C. J., said:

"The Judge clearly has jurisdiction to determine whether the party owes more than £300, and he has decided that he does not owe more, within the meaning of the statute.

* * It can not be contended that wherever a county Judge misconstrues, or is supposed to misconstrue an Act of Parliament there is any ground for a prohibition. * * It was within the jurisdiction of the Judge to decide whether a particular alleged debt was to be taken into account."

And see *Mayor of London v. Cox*, L. R. 2 H. L. at pp. 275, 276, and *Brittain v. Kinnaird*, 1 Brod. & B. 432, per Richardson, J.:

"Whether the vessel in question were a boat or no, was a fact on which the magistrate was to decide, and the fallacy lies in assuming that the fact which the magistrate has to decide, is that which constitutes his jurisdiction."

Applying these authorities to the present case, it is seen to be entirely within the principle on which they were

decided. The Judge had jurisdiction over the subject-matter, and was therefore competent and bound to decide any facts, or questions of law and fact combined, of which the status of the applicant was one, necessary to be adjudicated upon in the course of the inquiry.

The authorities to which we have been referred since the argument do not touch this point. Some of them such as *Elston v. Rose*, L. R. 4 Q. B. 4; *Ahrens v. McGilligat* 23 C. P. 171; *Westover v. Turner*, 25 C. P. 560, come within the principle of *Thomson v. Ingham*, *supra*, and that class of cases, where jurisdiction is ousted by something collateral to the merits of the case, while others are cases of prohibition to Courts of Prize or to Spiritual Courts, which proceed by the rules of the civil or canon law, and to which prohibition was *in all cases* granted by the Courts of Common Law, where they were deciding or assuming to decide on temporal matters, whether relating to the construction of an Act of Parliament or otherwise, in a manner different from that in which the temporal Courts would decide them. Not only was want of jurisdiction considered a ground of prohibition, but also the circumstance of a Court, proceeding by the rules of the civil law, deciding otherwise than Courts of Common Law would upon the same subject. *Gould v. Gapper*, 5 East 345; *Burder v. Veley*, 12 A. & E. 233, 311, 312; *Home v. Camden*, 2 H. Bl. 533, 535.

Upon the question which is dealt with by the judgment, viz., whether the appellant is a person at whose instance the County Judge is authorized to order an amendment of the plan, it is not necessary, in the view I take of his jurisdiction, to say much. But as the appellant's right has been controverted by the judgment, I think it is only proper to add that, whether he is or is not "an assign" within the meaning of the Act, he is probably entitled under the other alternative, as being a person who filed or registered the plan. It is not said that the person registering must then be the owner. It may be done in contemplation of becoming the owner. When the appellant

registered, it may have been and probably was a perfectly futile proceeding against everybody, but when he afterwards became the owner of the land he might adopt the plan as he, in fact, seems to have done. Now, as the owner, he asks that the plan thus registered by him may be amended, and I think he comes within the Act.

The only other point argued was whether the portion of Water street in question had been effectually dedicated as a highway. Upon this we do not feel called upon to express an opinion. The case of *Attorney General v. The Bi-phosphated Guano Co.*, 11 Ch. D., 327, 340, may be referred to.

On the whole I think the appeal should be allowed.

HAGARTY, C. J. O., BURTON and PATTERSON, JJ. A., concurred.

Appeal allowed, with costs.

THE CANADA ATLANTIC RAILWAY COMPANY v. THE
CORPORATION OF THE CITY OF OTTAWA ET AL.

*By-law—Debentures—Delay—Change of circumstances—Irregularities—
Formalities—36 Vict. ch. 48, secs. 226, 231, 236, 248, 471, (O.)*

A by-law of the defendant corporation, providing for the delivery of debentures to a railway represented by the plaintiffs as a bonus to aid them in constructing their railway, having been adopted by a vote of the ratepayers on October 16th, 1873, was read a second and third time and passed by the council on October 20th, but was neither signed nor sealed, because a month had not elapsed from its first publication, the notice required by 36 Vict. ch. 48, sec. 231, sub-sec. 3, to be appended to the copy of the by-law as published, having stated that the by-law would be taken into consideration after a month. On November 5th, 1873, a motion made in the council to read the by-law a second and third time and pass it, was lost. On April 7th, 1874, after the election of a new council, it was finally passed, signed, and sealed. The by-law voted on by the council was to take effect and come into operation on the 30th December, 1873, while the copy published stated the 13th December, 1873, to be the day. The railway company were bound by their original charter to commence within three years, and to finish the road within eight years, which they failed to do within the specified time.

Held, (affirming the decision of the Chancery Divisional Court, 8 O. R. 201,) that the plaintiffs were not in a position to enforce the delivery of the debentures after the lapse of nine years from the passing of the by-law, when a total change of circumstances had taken place, and when the period fixed by the plaintiffs' charter for the completion of the railway had expired.

Per HAGARTY, C. J. O., and PATTERSON, J. A.—The by-law was not legally passed, and did not acquire a legal existence until April 7th, 1874. It was subject to the provisions of 36 Vict. ch. 48, sec. 248 (O.), and was invalid under that section, because it did not name a day in the financial year in which it was passed on which it was to take effect.

Per HAGARTY, C. J. O.—A variance between the proposed by-law and the copy submitted to the ratepayers to vote upon, as to the day upon which it was to take effect, was also fatal to the by-law.

Per PATTERSON, J. A.—The acts of signing and sealing a by-law are formalities which sec. 248 makes essential to a by-law for contracting a debt, and those acts should be done at the meeting at which the by-law has been passed, or at all events during the tenure of office of the member of the council who presides. The direction in sec. 236, that a by-law carried by a majority of voters shall, within six weeks thereafter, be passed by the council which submitted the same, refers to the council of the year in which the by-law was submitted, and not merely to the council of the same municipality; it is not intended by sec. 236 that the passing by the council should be a mere formality, such as would be satisfied by the irregular passing on October 20th, 1873.

THIS was an appeal by the plaintiffs from the judgment of the Chancery Divisional Court, (8 O. R. 201) affirming the judgment of Proudfoot, J., (8 O. R. 183) at the trial, dismissing the action, which was brought to obtain a

declaration that a certain by-law of the defendants was valid, and to enforce its performance by the delivery of debentures to the plaintiffs pursuant thereto.

The facts and arguments appear in the two former reports and in the present judgments.

The appeal was heard on the 7th of May, 1885.*

McCarthy, Q. C., and *Gormully*, for the appellants.

J. Maclellan, Q. C., and *MacTavish*, for the respondents.

May 26, 1885. HAGARTY, C. J. O.—We are not embarrassed in this case by any consideration as to giving effect to objections to a by-law after money being raised or works executed in accordance with its provisions. I think we are bound to examine with great care the manner in which it was passed after the lapse of so many years, and after the many changes in the body of ratepayers, and in the ownership of property, that must have occurred since 1873.

We heard much argument on the question: When was this by-law passed into a law? Our answer, on the evidence, must, I think, be: On April 7th, 1874.

After its adoption by vote of the ratepayers on the 16th of October, 1873, it was brought up for a third reading in the council on October 20th.

A resolution appears on the minutes that the by-law be read a second and third time and passed. This appears as carried. But the by-law was neither signed nor was the city seal affixed—the mayor stating as a reason that the resolution was premature, as a month had not elapsed from the first publication.

Then on November 5th it was again moved that, as the council had passed it prematurely, it be now read a second and third time and passed, and this motion was lost.

Finally on April 7th, 1874, after the election of a new council, it was moved that, as it had been prematurely

**Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, J. J. A., and GALT, J

passed before lapse of the time prescribed by law, it should be read the second and third time and passed. This motion was carried, and the by-law was signed by the mayor and the corporate seal affixed.

Mr. Gormully argued that this by-law did not come within section 248 of the Act of 1873—the then Municipal Act—but was governed by section 471, in which the power to grant a bonus to a railway company is conferred. This latter clause contains no provision for the form or the special requirements of the by-law.

Section 248 seems to provide for all by-laws for contracting debts by borrowing money and levying rates, &c., “for any purpose within the jurisdiction of the council,” but no such by-law should be valid, which is not in accordance with the following restrictions and provisions, except so far as may be otherwise provided in the next two sections, &c.

Then come the requirements. The next section, 249, provides for works payable by local assessment. Section 250 allows them to provide for re-payment of principal, &c., re-payable in equal annual instalments.

It seems to me that this clause 248 certainly governs the present case, and is intended to require all by-laws for creation of debts payable beyond the financial year, to have certain statutable statements essential to their validity.

The first of these is: “The by-law, if not for creating a debt for the purchase of public works, shall name a day in the financial year in which the same is passed, when the by-law shall take effect.”

I do not think it is any answer to point out that there may be difficulty in applying these provisions to some cases, such as that in section 471, as to indorsing or guaranteeing debentures, or for taking stock, &c.

The by-law before us seems clearly to come within the kind of by-law mentioned in section 248, and I think that section governs it.

By section 232, sub-sec. 2, a copy of the by-law is to be published.

Section 226: "Every by-law shall be under the seal of the corporation, and shall be signed by the head of the corporation, or by the person presiding at the meeting at which the by-law has been passed, and by the clerk of the corporation."

Section 236: "Any by-law which shall be carried by a majority of the duly qualified electors voting thereon, shall within six weeks thereafter be passed by the council which submitted the same."

In *Re Mottashed and The Corporation of Prince Edward*, 30 U. C. R. 74, 79, Richards, C. J., says: "If the seal was not put to the by-law when it was passed, it would surely not make it a good by-law to put the seal to it three months after it was passed, and when the persons composing the governing body of the corporation were entirely changed. It seems to us, under the plain words of the Act, it could not be a by-law at all unless it was under the seal of the corporation;" and refers to *Re Croft and The Corporation of Brooke*, 17 U. C. R. 269, and other cases.

I am very clearly of opinion that this by-law never assumed a completed shape, or acquired a legal existence until April 7th, 1874.

It was specially refused authentication on October 20th, because it was taken up and read a third time prematurely.

It was specially rejected by the council on November 5th.

Taking it then as a by-law of April 7th, 1874, and passing by the objection that the by-law should be ultimately passed by the same council as that by which it was submitted to vote, we are confronted by the formidable difficulty that it appears to come into effect on the 30th December previous.

The 248th section, which I hold governs, declares that to be valid it must name a day in the financial year in which it is passed.

I do not see how this objection can be answered. My brother Proudfoot held that it is governed by the 248th section. The judgment of the Divisional Court is to the

same effect, although the error was held not to be fatal. There was also the mistake as to the variance between the proposed by-law and the copy laid before the voters.

The by-law named the 30th December as the day on which it was to take effect and come into operation. The copy published stated the 13th December as the day.

As to the strictness required in copying or publishing a notice required by statute, I refer to *Spice v. Bacon*, 2 Ex. D. 465, (Court of Appeal). I am unable to hold that my brother Proudfoot was wrong in holding these objections fatal. The first seems to me insuperable.

If I did not feel these objections to be fatal, I would have to consider the very grave remaining questions, whether the long delay that has taken place, and the consequent changes in the ownership of property and in the body of ratepayers, the legislation as to the financial position of the city, and the wholly altered relations between the city and the railway systems of the country, ought not to prevent the interference of the Court.

Nine years were allowed to elapse between the passing of the by-law and the commencement of these proceedings. It is argued that on several occasions the corporation, or rather the members of the council, from time to time recognized by their speeches and actions the existence of this liability.

The Courts, as a general rule, have always declined to permit the individual utterances or actions of councilmen to alter the legal liabilities of municipalities. The inhabitants of the city may be said to be the corporation—the councilmen merely their temporary managers or officers. It is difficult to conceive anything more disastrous or unjust towards the present ratepayers than to compel the issue *nunc pro tunc* of debentures of 1873, and the payment of the arrears of twelve years' interest and sinking fund. The mere statement of such a claim is startling to the ordinary tax-payer's mind.

When the undertaking, for the completion of which as a link between Ottawa and Montreal the ratepayers agreed

to this large burden, was practically abandoned for a number of years, it would not unreasonably be supposed by vendors and purchasers of property, that there was also an abandonment of claim on the city to fulfil its contract of 1873, which must have been based on the expectation of realizing within at least a reasonable time the benefits from the promised railway.

I think any company obtaining a bonus like this from a municipality ought to act with reasonable promptitude in having the matter fully completed, so far as the issuing of the promised securities, and to prevent the extreme injustice to which the ratepayers of the future may be subjected by allowing such a claim to be renewed, after the lapse of years and total change of circumstances.

It seems to me impossible to treat a municipality on the same footing as an individual contracting for himself and bound by his own conduct, declarations, and acknowledgments.

I think the appeal must be dismissed.

BURTON, J. A.—I express no opinion upon the several technical objections which were taken upon the argument to the by-law in question, beyond guarding myself against my silence being construed into an assent to the view expressed by the Chief Justice, that section 248 of the Act of 1873 applies to a by-law of this description, passed under the provisions of section 471. At present I entertain a good deal of doubt upon that point.

It is clear that that section, or the section for which section 248 is substituted, could not have been intended to apply to section 349, for which section 471 is now substituted.

The section as originally passed had reference to by-laws for subscribing for shares in a railway, for lending money to railways, indorsing or guaranteeing the payment of any debentures of the railway, and for issuing debentures in sums of not less than \$20; and whilst providing that no liability should be incurred until the by-law should have

received the assent of the ratepayers the class of debentures is altogether different from those contemplated under the sections relating to those securities generally—no time is limited for the running of such debentures, and a separate and distinct power is given by the section itself for assessing and levying a sufficient sum to discharge the engagement thus created. The very nature of some of the engagements referred to precludes the possibility of applying strictly the provisions of section 248; and when the Legislature amended that section by adding to it the sub-section now to be found in the Act of 1873, for granting a bonus to any railway, I think it would have been rather a forced construction to hold that section 248 applied to that sub-section, and not to the other sub-section found in the same enactment.

It might perhaps with more force be argued that if the by-law was passed under section 472, the general provisions as to all by-laws applied; but that point was not raised.

I agree however with the Court below in holding that the plaintiffs are not in a position to enforce the delivery of the debentures after the expiration of the period fixed for the completion of the railway, to aid which the by-law was passed. I think the most that can be said is—no other time being expressly named in the by-law—that if the railway company completed the work within the time limited by their charter, they should be entitled to the bonus and not otherwise.

I am of opinion, therefore, that the appeal should be dismissed.

PATTERSON, J. A.—The reason given in the Divisional Court for refusing the prayer of the plaintiffs, in which the Court concurred with the decision of the learned Judge who tried the action, has not in my opinion been successfully answered.

Assuming the by-law to have at one time had a valid existence, I think the objections founded upon the failure

of the Montreal and City of Ottawa Junction Railway Company to proceed with and complete the work, as contemplated when the bonus was proposed to be granted, and the change of circumstances pointed out by my brother Proudfoot at the trial, and by my brother Osler in the Divisional Court, are conclusive against the plaintiffs.

But I am by no means satisfied that the by-law was ever valid or operative.

Mr. Gormully argued with a good deal of force that section 248 of the Municipal Institutions Act of 1873 did not apply to the by-law in question; but, after considering the statutes, I have come to the conclusion that his argument cannot be acceded to.

The terms of the section are beyond question wide enough to include every by-law by which money is authorized to be borrowed.

It declares that "Every such council may, under the formalities required by law, pass by-laws for contracting debts by borrowing money, and for levying rates for the payment of such debts on the ratable property of the municipality, for any purpose within the jurisdiction of the council; but no such by-law shall be valid which is not in accordance with the following restrictions and provisions, except in so far as may be otherwise provided in the next two sections of this Act."

The next two sections merely vary the formal requisites when the by-law is for work payable by local assessment or for raising money to be repaid by instalments, and therefore the express exception does not add strength to the general terms of section 248.

The "formalities required by law" doubtless include those prescribed by section 226, which declares that every by-law shall be under the seal of the corporation, and shall be signed by the head of the corporation, or by the person presiding at the meeting at which the by-law has been passed, and by the clerk of the corporation.

The borrowing of money to give as a bonus to a railway company was certainly not a purpose within the

jurisdiction of a municipal council when the clause which became section 248 of the Act of 1873 was first framed. That power was introduced in 1871, by 34 Vict. ch. 30, sec. 6, O., which added to section 349 of the Municipal Institutions Act of 1866, (29 & 30 Vict. ch. 51,) a sub-section "For granting bonuses to any railway, and to any person, or persons, or company, establishing and maintaining manufacturing establishments within the bounds of such municipality; and for issuing debentures, payable at such time or times, and bearing or not bearing interest, as the municipality may think meet, for the purpose of raising money to meet such bonuses."

In carrying this clause into the Act of 1873, some changes were made.

The provision touching the promotion of manufactures was separated from that concerning railways. The latter provision became part of section 471; but in place of being added to the end of the section, which had before consisted of four sub-sections, it became sub-section 4, and the former sub-section of that number became sub-section 5.

Its language was also changed, making it read, "For granting bonuses to any railway company in aid of such railway, and for issuing debentures *in the same manner as is in the preceding sub-section provided* for raising money to meet such bonuses."

The preceding sub-section, No. 3, reads thus: "For issuing for the like purpose debentures, payable at such times and for such sums respectively, not less than \$20 and bearing or not bearing interest, as the municipal council may think meet." This does not differ from what was in the new clause when passed in 1871.

Then sub-section 5 adds the provision: "For directing the manner and form of signing and indorsing any debenture so issued, indorsed, or guaranteed, and of countersigning the same, and by what officer or person the same shall be so signed, indorsed, or countersigned respectively: but no municipal corporation shall subscribe for stock or incur a debt or liability for the purposes aforesaid, unless

the by-law, before the final passing thereof, shall receive the assent of the electors of the municipality in manner provided by this Act."

Then came sections 472, 473, and 474, which covered all the ground that was covered by sub-section 4 with the aid of sub-sections 3 and 5, though their scope was somewhat different, and which contained provisions of the same character as those of section 248, though not identical with them and not including the requisites in respect of which this by-law is said not to comply with section 248.

If these three sections had continued to form part of the statute, it might perhaps have been difficult to hold that section 248 applied to any by-law for granting a bonus to a railway company.

The three sections were repealed in March, 1874, by 37 Vic. ch. 16, sec. 22, (O.), which provided that their repeal was not to affect any thing legally done under them or any of them, or any proceedings commenced under them or any of them, which proceedings were authorized to be continued as if the three sections had not been repealed.

Those three sections appear to have originated in acts respecting the Fenelon Falls Railway. Section 472 was section 19 of the special Act, 34 Vict. ch. 43, (O.), which was passed at the same time as ch. 30, in which sub-section 4 was introduced; and sections 473 and 474 are found in 35 Vict. ch. 60, (O.), which amended the special Act. They were for a year part of the general Municipal Institutions Act of 1873, and during that year the proceedings for the passage of the by-law now in question were taken. But those proceedings were not, in my opinion, taken under any of the three sections.

It is manifest from the Acts in which the three sections originated, and more particularly from that by which they were repealed, that they were regarded by the Legislature as forming a system separate or separable from that embodied in section 471; and although I think that any bonus authorized by section 471 might also have been granted under section 472, yet the latter section authorized assis-

be passed by the council which submitted the same, refers to the council of the year in which the by-law was submitted, and not merely to the council of the same municipality.

The acts of sealing and signing a by-law may be called formalities, not however in the sense of being merely ministerial acts of routine, but formalities which section 248 makes essential to a by-law for contracting a debt.

If we hold, as was held, and in my opinion correctly held, in the two cases I have cited, that those formalities are not retroactive; and if we hold, as in my opinion it must be held, that when section 248 (1) speaks of the financial year in which a by-law is *passed*, the completion as an operative by-law is intended, notwithstanding that the word "passed" may in other places express only the vote at a meeting of the council; and notwithstanding that the word "by-law" may be used with reference to all stages of the measure, denoting what in parliamentary phraseology would be called a *bill*, as well as what is called an *act*; then, even if the passing and sealing and signing in 1874 of the by-law of 1873 were operative and not nugatory acts, the by-law did not name a day in 1874 when it was to take effect, and so offended against section 248.

The other objection under this section is that, by the by-law as advertised and voted on, the debt was not payable within twenty years, owing to the substitution by somebody's blunder, of 13th for 30th of December.

I could not hold that the extension of the period beyond the twenty years vitiated the by-law, without deciding that this requisite of section 248 is not modified by the terms of section 471, to which I have already called attention; and, although strongly inclined to that opinion, I do not think a decision of the point is now required. But the error in the date is significant in other phases of the argument.

Thus, when it is urged that section 236 made it obligatory to pass the by-law, and in fact made the vote the

effective passing of it, the conclusion from those premises must be, that the by-law passed was in all respects that which was voted on. But, when the contention is, that the precise date was not material, and that the vote would have been the same whether it was printed 13th or 30th, the reliance is shifted to the subsequent acts of the council, and we are back at the inquiry whether those acts amounted to a valid passing of the by-law.

I cannot see my way so to hold.

The notice appended to the published copy of the by-law must, I think, have more importance attributed to it in connection with what actually happened.

When considering how far the limitation of time for taking the by-law into consideration by the council—"after one month from the first [publication]"—is directory only or obligatory, we must remember that that limitation is not found in any direct enactment, but only in the notice appended to the copy of the by-law as published.

The notice is, that the proposed by-law will be taken into consideration after one month. This by-law was taken into consideration after one month, viz., on the 5th November, 1873, and, so far, the notice was literally followed. But the motion made on that occasion to pass the by-law was lost.

Now, in order to sustain the premature passing of the by-law on the ground of the limitation of time being directory only and not imperative, we should have to surmount two impediments which at present seem to me insuperable. "It has often been held," Littledale, J., remarked in *Smith v. Jones*, 1 B. & Ad. at p. 334, "where an Act ordered anything to be performed by a public body, and merely pointed out the specific time when it was to be done, that such act was not imperative, but directory, and might be complied with in a reasonable time after the period prescribed."

That is a general statement of the doctrine, and numerous decisions can be cited as instances of its application; but I am not aware of any case in which a duty directed

by statute to be done at or after a stated time, has been held to be validly performed before the time.

But it happens that the by-law was taken into consideration by the council twice in 1873; once before the month expired, and once after the month. It would be a novel application of the doctrine to hold that the former, or the irregular action, was valid, and that it neutralized the latter, or the regular action.

If section 236 has not made the passing of such a by-law, after it has received a majority of votes of the rate-payers, a mere matter of form, or a mere registration of the result of the voting, it would, I think, be undesirable to concede the existence of a power so capable of abuse as the power of a quorum of the council to meet and pass the by-law before the time limited by the statutory notice.

I do not think section 236 has the effect contended for. If that had been intended, the object would have been accomplished much better, and in a simpler manner, by declaring that, when carried by the ratepayers, the by-law should be *ipso facto* binding. All the other machinery would be useless and purposeless. There would be no object in the limitation of the month, and no meaning in the farce of taking the by-law into consideration.

But we find no such plain declaration.

On the contrary, we have the duty cast on the council to wait a month from the first publication, and then to take the proposed by-law into consideration—the council being at liberty, so far as anything in section 231 is concerned, to pass or reject the by-law as to the majority may seem best.

The words of section 236 are: "Any by-law which shall be carried by a majority of the duly qualified electors voting thereon, shall, within six weeks thereafter, be passed by the council which submitted the same."

The question is, what is the effect of the words "shall be passed?"

I think we should take them to mean, "shall be taken into consideration," or "shall be disposed of," thus reading

the clause in *pari materia* with the notice under section 231.

The words cannot be construed to declare that the by-law shall operate without being passed by the council ; and therefore while they may, if read literally, expose the members of the council to penalties for disobeying what is ordered, they leave the validity of the by-law very much where it was.

The submission of the by-law to the people is, under section 231, to be "before the *final passing thereof*." Yet it cannot be contended that that section requires that the by-law shall finally be passed, even though approved by the electors. It is to be "taken into consideration," of course with a view to its being finally passed, but that section does not make the passage obligatory.

Section 236 has plenty of room for operation without coming into conflict with the earlier section.

It makes a majority of the electors who vote sufficient, without requiring a majority of all the electors of the municipality, and thus removes a doubt which section 231 admitted ; and while that section declared only the time that was to elapse before the by-law was taken into consideration, section 236 fixes the other extreme as six weeks after the voting, if the same council which submitted it remains in office.

This reading of the section appears to me to satisfy its language and to reconcile it with the earlier provisions.

If a greater effect was intended it could have been put beyond doubt by a few words, and doubtless would have been embodied in a direct enactment. But whether my construction of the section is correct or incorrect, the circumstance that the passing of the by-law by the council is not dispensed with remains, and the defects are not cured.

I agree that we must dismiss the appeal, with costs.

GALT, J., concurred in dismissing the appeal.

Appeal dismissed, with costs.

HAMILTON PROVIDENT AND LOAN SOCIETY v. CAMPBELL.

*Mortgage—Agreement—Right to growing crops—Execution creditor—
Seizure—Sale—Judgment in ejectment—Relation back.*

C., being in default on his mortgage of realty to the plaintiffs, in April, 1882, gave them a chattel mortgage, in consideration of which they agreed to allow him to remain in possession and take the year's crop. On the 2nd July, 1882, the plaintiffs took formal possession of the land. On the 17th July, 1882, the defendant, having obtained judgment against C., placed a *fi. fa.* in the hands of the sheriff, who seized the growing crops on the land in question on the same day, and sold them in August.

The plaintiffs had commenced ejectment proceedings on the 15th June, and they signed judgment on the 30th September, in the same year.

The plaintiffs claimed the crops, and an interpleader issue was tried.

Held, [affirming the judgment of the Common Pleas Division, 5 O. R. 371] that the defendant had the right on the 17th July, by virtue of the agreement made in April, to seize the crops as C.'s property.

The seizure and sale having taken place before the judgment in ejectment, the rule that the judgment related back to the day of the commencement of the action, so as to make C. himself a trespasser from that date, could not avail the plaintiffs.

THIS was an appeal by the plaintiffs from the judgment of the Common Pleas Divisional Court, (5 O. R. 371) in favor of the defendant upon an interpleader issue.

The facts appear in the former report and in the present judgment.

The appeal was heard on the 12th of December, 1884.*

Muir, for the appellants.

Watson, for the respondent.

December 18, 1884. HAGARTY, C. J. O.—The issue directed was to try whether certain growing crops, seized by the sheriff on a writ at defendant's suit against one Cochrane, were at the time of seizure, about the 17th July, 1882, the plaintiffs' property as against the execution creditor.

Cochrane was in default on his mortgage to plaintiffs.

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It was found as a fact at the trial that in April, in consideration of Cochrane giving a chattel mortgage on his loose property to plaintiffs, they agreed to allow him to remain in possession and take the year's crop.

On the 11th July defendant obtained judgment by default against Cochrane, and on the 17th July the *fi. fa.* was given to the sheriff. The plaintiffs commenced ejectment proceedings on the 15th June. Cochrane appears rather to have taken part with them against defendant, and the ejectment was brought possibly in consequence of defendant's threatening or taking proceedings. Judgment in ejectment was signed on the 30th September.

The sheriff seems to have seized the growing crops about the 17th July, and sold them in August. It would seem that they must have been harvested and removed before judgment in ejectment.

As between Cochrane and the Company, he was to have the year's crops, and they could not have treated him as a trespasser (apart from the ejectment proceedings), as he was there and harvested them by their license or demise for the year or season. Therefore the execution creditor had the right to seize them as Cochrane's property. All this was done before the recovery in ejectment, and, therefore, the plaintiffs' argument seems to fail, as it would be only by the legal effect of the recovery that the plaintiffs' title could relate back to the day of demise, or commencement of action.

Hodgson v. Gascoigne, 5 B. & Ald. 88, is no authority for the plaintiffs. There the *fi. fa.* was placed in the sheriff's hands, and judgment was recovered in ejectment the same day, and on the following day the goods of the tenant were seized. The Court held that the property in the growing corn was not at the time of seizure vested in the tenant, for he was to be considered a trespasser after the judgment was obtained, from the day of the demise laid in the declaration.

Several authorities are referred to to that effect in the judgment appealed from.

I do not see how we can properly interfere either with the findings on the facts or on the law of the case.

BURTON, PATTERSON, and OSLER, JJ. A., concurred.

Appeal dismissed, with costs.

WILSON v. BEATTY—RE DONOVAN AND MORPHY.

Solicitor—Summary jurisdiction—Enforcing undertaking—Private or professional character.

The Court will not summarily compel a solicitor to perform an agreement or undertaking, merely because he is a solicitor; if it was not given by him in his professional connection with the suit or matter, the party to whom it is given will be left to his action.

Where M., a solicitor, unsuccessfully prosecuted a petition against the applicant at his own expense, in the name of one H., agreeing to indemnify H. against costs, M.'s interest being merely as surety on a bond for H., a summary application to make M. pay the costs of the petition was refused.

THIS was an appeal from the judgment of Mr. Justice Proudfoot, dismissing the petition of Mr. J. A. Donovan, for an order directing Mr. George Morphy, a solicitor, to pay the costs of certain proceedings.

The case was this: John Haldan was formerly administrator *pendente lite* of the estate of one Wilson, deceased, and Donovan, the petitioner and appellant, under his instructions, brought, on behalf of the estate, several actions, the costs of which were taxed by the proper officer, and paid to him by Haldan.

Wilson's executors subsequently filed their bill against Haldan for an account of his administration, and re-taxation of the costs paid by him to Donovan. An order for re-taxation was made, and a large portion of the costs in question disallowed. Haldan was ordered to pay the amount so disallowed into Court, and failing to do so, proceedings were taken against the sureties in his administration bond.

One of the sureties, Mr. George Morphy, the now respondent, thereupon, with the consent of Haldan, procured a petition to be presented to the Court, and prosecuted in Haldan's name, against Mr. Donovan, praying that the latter might be ordered to pay into Court the amount so ordered to be paid by Haldan, and on default of his so doing that his name might be struck off the roll of solicitors.

The petition was prosecuted at Morphy's expense, and he agreed with Haldan to indemnify him against the costs thereof.

An order was made on the petition, as prayed, which was, however, reversed on appeal, and the petition dismissed, with costs, to be paid by Haldan. Donovan, alleging that he was unable to obtain payment of these costs from Haldan, and that Morphy was, in the circumstances, the proper person to pay them, presented the petition now in question, which, after argument, was dismissed by Mr. Justice Proudfoot.

The appeal was heard on the 20th of March, 1885.*

Donovan, the appellant, in person.

Hoyles, for the respondent.

April 17, 1885. OSLER, J. A.—This is an attempt to extend the summary jurisdiction which the Court exercises over solicitors, further than any reported case has yet gone.

The Court will not summarily compel a solicitor to perform an agreement or undertaking, merely because he is a solicitor.

If it was not given by him in his professional character, or in relation to or in consequence of his professional connection with the suit or matter, the party to whom it is given will be left to his action, as the following cases shew :

Ex parte Clifton, 5 Dowl. 218 : An attorney, in consideration of a party allowing his name to be used as plain-

* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

tiff in an action, though he had no interest in the matter in dispute, undertook to indemnify him against the costs of the action. The Court refused to compel him to pay summarily pursuant to his undertaking. Littledale, J., said, "You must bring an action against him on his contract of indemnity. This is a very different case from those in which the Court has been in the habit of interfering summarily against attorneys. The utmost extension of that power was in the case of *The matter of Aitkin*, 4 B. & A. 47. There, the Court interfered because the employment of the attorney was so connected with his professional character as to afford a presumption that his employment was in consequence of that character; and there he was compelled in a summary way to execute the trust reposed in him."

In *Re Hilliard*, 2 D. & L. 919, Coleridge, J., said, "The Court does not interfere merely with a view of enforcing contracts, on which actions might be brought, in a more speedy and less expensive mode; but with a view to securing honesty in the conduct of its officers, in all such matters as they undertake to perform or see performed, when employed as such, or because they are such officers."

In *Re Gee*, 2 D. & W. 997, the same learned Judge said, "The question is, has the undertaking * * been given by the attorney in his character of attorney in the transaction in dispute?"

Re Fairthorne, 3 D. & L. 548. "There is no doubt that if a man give an undertaking, the mere fact of his being an attorney does not make it an undertaking as attorney, so as to render him amenable to the summary jurisdiction of this Court."

See also *Re Kearnes*, 11 Jur. 521; *Northfield v. Orton*, 1 Dowl. 415.

In our case there is nothing to lead us to suppose that the undertaking had any relation to the professional character of the person against whom it is sought to be enforced.

It is one that might have been given by any surety who desired his principal to take proceedings which might be beneficial to both of them, but the risk of which the principal was unwilling to incur.

If, therefore, as is clear, Haldan himself could not have successfully invoked the summary jurisdiction of the Court, *a fortiori*, the appellant, who is not in privity with him, cannot do so either. And even if there was an equity in him to have the benefit of the undertaking (*Touche v. Met. R. W. Warehousing Co.*, L. R. 6 Ch. 677; *Gale v. Gale*, 6 Ch. D. 144; *Joyce v. Hutton*, 12 Ir. Ch. R. 71; *Mulholland v. Merriam*, 19 Gr. 288; *Ex parte Piercy*, L. R. 9 Ch., at p. 43) he could not obtain it on a proceeding of this kind.

Cases like *Nurse v. Durnford*, 13 Ch. D. 764, and *Reynolds v. Howell*, L. R. 8 Q. B. 398, where the solicitor was shewn to have been guilty of misconduct in using the name of a party in the cause without his knowledge consent, or authority, and was therefore ordered to pay the costs of all parties, have no application here.

The petitioner relied chiefly on the case of *Re Jones*, L. R. 6 Ch. 497, better reported in 40 L. J. Ch. 113, but which the learned Judge below, I think, rightly distinguished.

In that case a solicitor, who had given the plaintiff in a suit an undertaking to indemnify him against the costs of the suit, was ordered to pay the defendants their costs of the suit when dismissed. It appeared that the plaintiff was unwilling to proceed with the suit, that the solicitor had no interest in the subject of the litigation, and had given the undertaking so that he might carry on the suit for the purpose of obtaining his costs from the defendants. The Chancellor, Lord Hatherley, said, 40 L. J. Ch. 117: "The solicitor has placed himself in a position in which the Court must say that the persons harassed by a litigation of that description must be indemnified by the person who has so harassed them * * The defendants might have come to the Court to stay the suit

on the ground of its having ceased to be the suit of the person who originally instituted it, and having become the suit of the solicitor." At p. 116, he says: "The principle is not that the Court, acting upon the notion of giving to the defendant in the suit a species of equity which the plaintiff had against his own solicitor who had entered into this contract of indemnity, and because the solicitor was bound by the contract to indemnify his client in the suit, would therefore give to the defendant, when the plaintiff turned out to be insolvent, the benefit of that contract, inasmuch as between the plaintiff and his own solicitor, the solicitor would have been obliged to indemnify him." And again: "His liability depends on the principle * * that the solicitor is not entitled to make a suit his own, and to harass persons with a suit which is no longer the suit of the nominal plaintiff, but which is in reality the suit of the solicitor, and is so conducted without the knowledge of the defendants."

And in the Law Reports the Chancellor is reported as saying in reference to the duty of the Court: "Care should be taken to see that the litigation is the *bonâ fide* litigation of the client who instructs the solicitor, and not a litigation carried on altogether on the solicitor's account. * * The view of the Court is, that where a solicitor takes upon himself the conduct of a suit by saying that he will indemnify his client against all costs—where the plaintiff is a mere puppet, and the real party suing is the solicitor—the Court will hold the solicitor liable for all the expenses to which he has put the other parties by his conduct."

The difference between that case and the present is obvious.

There, there was no *bonâ fide* litigation, it was carried on by the solicitor, *qua* solicitor, for the mere purpose of getting his costs from the opposite party, his own client being insolvent and desirous of abandoning the litigation. Whereas, here the solicitor had, as also had the party who consented to the use of his name, a direct interest in the matter in litigation. The proceedings were instituted by

him in good faith, for the purpose of protecting himself as surety, and not for the purpose of obtaining costs by means of a litigation, which would not otherwise have been carried on.

The appeal must be dismissed.

HAGARTY, C. J. O., BURTON, and PATTERSON, JJ.A. concurred.

Appeal dismissed, with costs.

FRADENBURGH V. HASKINS.

Insolvent debtor—Husband and wife—Preference—Fraudulent transfer of notes by husband to wife—R. S. O. ch. 118—Questions for the jury.

In an action impeaching the transfer of certain notes by an insolvent trader to his wife, the husband swore such transfer was made to secure her the payment of moneys loaned by her. Immediately after such transfer he absconded from the Province. At the trial the jury found, in answer to questions put by the presiding Judge, (1) that the husband at the time he absconded was not solvent and able to pay his debts in full; (2) that he knew himself at the time to be on the eve of insolvency; (3) that the transfer of the notes to his wife was not voluntary; (4) that the scheme of such transfer originated with him and not with his wife. The jury, however, failed to find with what intent the transfer was made, and gave a verdict in favor of the defendant (the wife), which, on motion in term, the judge refused to disturb.

On appeal this Court, being of opinion that the answers given by the jury did not afford sufficient ground for a decision under ch. 118, R. S. O., ordered a new trial, but under the circumstances directed each party to bear their own costs, both of the appeal and of the new trial.

THIS was an appeal by the defendant from the judgment of the County Court of Haldimand, discharging an order *nisi* to set aside the judgment for the plaintiff, and enter judgment for defendant, or for a new trial, in an interpleader issue as to the ownership of certain promissory notes seized by a sheriff under an execution against L. B. Fradenburgh, at the suit of the defendant, and

claimed by the plaintiff, the wife of L. B. Fradenburgh, as having been transferred to her by her husband.

The facts further appear in the judgment.

The appeal was heard on the 16th of October, 1885.*

J. K. Kerr, Q. C., for the appellant
Coulter, for the respondent.

October 19, 1885. The judgment of the Court was delivered by PATTERSON, J. A.—The jury in this case answered four questions, the literal effect of the answers being: 1st. L. B. Fradenburgh, the absconding debtor, was not, at the time he absconded, solvent and able to pay his debts in full: 2nd. He knew himself at that time to be on the eve of insolvency: 3rd. The transfer of the notes to his wife was not voluntary: 4th. The scheme of the transfer originated with him and not with his wife.

We have no note of the learned Judge's charge to the jury, nor anything else to enable us to read these answers as covering any more ground than what is covered by their literal import, and that is not sufficient to enable us to deal with the application of chapter 118 of the R. S. O. to the impeached transaction.

We think the proper course will be to order a new trial. To that extent the appeal will be allowed, but it must be allowed without costs, and the order for a new trial will also be without costs.

The motion in the Court below asked the Court to set aside the jury's negative answer to the third question, and to answer that question in the affirmative, on the ground that there was clear evidence that the transfer was voluntary, and made by L. B. Fradenburgh with intent to defeat or delay his creditors, or with the intent to give the plaintiff a preference over his other creditors. The jury were not in terms asked to find the intent.

The word "voluntary," when used with reference to a contract or a transfer of property, ordinarily denotes the

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absence of valuable consideration. We do not understand that in this case the jury meant by their third answer to negative the existence of the alleged debt from Fradenburgh to his wife, or that the notes were given to her on account of that debt; and although the fact that she was a creditor is not expressly found, it was probably conceded at the trial. We take the fact to be that what was meant was, that the husband did not *sua sponte* resolve to hand over the notes, and that there was some other motive than his voluntary or uninfluenced desire to pay his wife, or give her the means of obtaining payment. No doubt a circumstance of that kind has, in cases which have been a good deal discussed in some of those referred to at the bar, been treated as very material in determining whether a forbidden intent existed, and more especially when a *fraudulent* intent was asserted; a voluntary or unsolicited act being less easily defended against impeachment under statutes like our chapter 118 than one which was induced by pressure or some other motive. But the fact that a transfer was voluntary in this sense is far from being conclusive of its being made with intent to defeat or delay creditors, or to prefer one creditor to others, nor is the fact that it may have been done at the suggestion of some one else, and not *sua sponte*, conclusive of the absence of the intent.

The answers to the third and fourth questions therefore do not, nor does either of them taken by itself, afford sufficient ground for a decision under chapter 118.

For this reason, amongst others, we cannot say that we have before us all materials sufficient to enable us to dispose of the issue even on the one question of intent.

We have been asked by the appellant to dispose of it in his favor, and as far as we can judge from what is before us, the contest before the Court is now turned entirely on that claim notwithstanding that a new claim was formally asked for.

There are grounds for thinking that the opinion of the learned Judge at the trial may not have been supported by

counsel to the importance of having the requirements of the statute more distinctly pronounced upon, and that, if this had been done, a new trial would probably have been unnecessary.

These are some of the considerations on which we consider that each party should bear his own costs of the trial, and of the argument below and of this appeal.

When the case goes down for trial again they will doubtless be careful to have all the facts found with which the second section of chapter 118 deals.

Was the claimant a creditor of her husband as she alleges? Was the husband, when he transferred the notes to her, in insolvent circumstances, or unable to pay his debts in full? The alternative inquiry as to his being on the eve of insolvency will probably be inapplicable to the circumstances. And did he make the transfer with intent to defeat or delay his creditors, or with intent to give his wife a preference over his other creditors or any one or more of them? The considerations which may enter into the determination of this last question are so many and various, and so dependent on the circumstances of each case, that no criterion of a character sufficiently general to be applicable in all cases can easily be formulated; but it will frequently be found useful where a transfer has been made by which a preference has in fact been obtained, and where the forbidden intent is denied, to ask a jury to say what they find to have been the intent or motive of the transfer. Two purposes may be served by this. It will aid in ascertaining that the matter has been intelligently considered by the jury; and it will enable the Court to deal more satisfactorily with its part of the inquiry.

Appeal allowed, without costs, and a new trial ordered, without costs.

GRAHAM V. SPETTIGUE ET AL.

Distraining cattle damage feasant—User of land—Demise—Covenant—Cattle re-entering—County Court—Jurisdiction—Title.

The defendants by an agreement under seal with one S. acquired a right of user in certain land for the purpose of pasturing their cattle. There was no demise, or right of distress, or anything in the agreement to make the defendants tenants of S. There was, however, a covenant that S. would not allow his own animals, or those of others to enter upon the land in question.

Held, that the defendants had no right under this agreement to distrain the plaintiff's cattle damage feasant upon the land.

Semble, the defendant's remedy (if any) was by action on the covenant against S.

A distraint of cattle damage feasant cannot be supported unless the cattle are taken at the time the damage is done; if they are driven out after doing damage, they cannot be seized on their re-entry for the former damage.

The question whether S. gave the defendants such an interest in the land as entitled them to impound the cattle is not a question of title in the sense that it would oust the jurisdiction of a County Court.

THIS was an appeal by the defendants from the judgment of the County Court of Middlesex, in an action of replevin for distraining damage feasant, one horse, one mare, and one colt.

The defendants pleaded in avowry that the animals were wrongfully in an enclosure demised to the defendants by one Staples, and there doing damage.

The material parts of the sealed instrument under which the defendants claimed the exclusive right to the enclosure in question are set out in the judgment delivered in this Court. The defendants also set up a verbal agreement with Staples, which the jury negatived.

The evidence shewed that the animals had been driven out after doing the damage of which the defendants complained, and that it was upon their return that they were taken and impounded.

The jury found a verdict in favor of the plaintiff, which the Judge of the County Court refused to disturb.

The appeal was heard on the 21st of April, 1885.*

**Preside*—HAGARTY, C.J., BRETT, PATTERSON, and COLER, JJ.A.

H. Becher, for the appellants.

R. M. Meredith, for the respondent.

April 30, 1885. HAGARTY, C. J. O.—I think the learned Judge was right in his construction of the agreement, and that no exclusive right of possession was in the defendants as to the place in which the plaintiff's cattle were distrained damage feasant. The alleged parol agreement was negatived by the jury, so that everything depends on the sealed agreement. The grantor agrees to stable the grantee's cattle in the stable under the barn, and will allow the grantee's cattle and horses to run in the enclosure round the barn and to eat the straw, &c. The grantor allows the grantee to pasture his cattle upon a fifteen-acre field, and not to allow other animals to be there pastured. And in winter time they are to be allowed to run over the three-acre field. And the grantor covenants that he will not allow his own cattle or animals or of any other person to enter on said portions of the said land above mentioned during said year. And at the end it is declared that "nothing herein contained shall be held or taken to give to grantee any right to occupy or possess any part of the said land, but merely a right to enter on such portions thereof as may be necessary and for the purpose only of the privileges hereby conferred upon him."

These words, read with the preamble clause, that the grantor had agreed to take defendant's cattle to pasture, and the words in clause 7 as to "a renewal of the above privileges" for a further term; the statements as to the use of a bull, &c., &c., all seem to indicate that there was no intention to give any exclusive right or exclusive possession to the grantee; that in substance it was not a demise of specific land, but a right of user in certain. It is said in the evidence that the enclosure was part of the three-acre field (p. 25); that in fact there was hardly any regular enclosure. If, therefore, this was included in the three-acre field, the right for grantee's cattle to run there was limited to the winter time by the written agreement, the parol agreement being negatived.

The learned Judge states that upon the evidence the alleged fence between the "enclosure" and the three-acre field was only put up a few days before the impounding, by a son of Staples (the grantor), as the latter swears, without his knowledge, and that there never had been a fence there before, and that he had rented the three-acre field to Graham, the plaintiff, for the season, about the 1st of May.

It appears to me that the defendants fail to shew any right to distrain the plaintiff's cattle, as they did in this portion of the premises called the "enclosure," whether it really was an existing enclosure at the date of the agreement or made such a few days before the impounding. If it were part of the three-acre field, the defendants had no right in it except in winter. If it were merely the part round the barn and stable, a kind of yard, the privilege given to defendants to run their cattle and horses there and eat of the straw does not seem to me to grant any such possessory or exclusive right as would warrant the impounding. The agreement seems carefully to avoid the use of terms calculated to confer any such right. Any remedy under it would seem to rest in covenant; there is no demise, no right of distress, nothing apparently to make defendants tenants of grantor.

In addition, the authorities shew that the right to distrain "damage feasant" requires, as the words imply, actual damage, and the cattle having done actual damage, and then being driven out and entering again, they cannot be seized for the former damage, but only for the damage then being done. Nor can one beast entering with another be distrained for any damage being done by the other, but only for its own damage. And if sufficient amends be tendered and distrainer refuse to deliver before impounding, damages are only recoverable for the detention. See the citation in argument in *Evans v. Elliott*, 5 A. & E. 142; *Bradby on Distress*, 141; in *Woodfall*, p. 444, in notes, the law is stated; *Wormer v. Biggs*, 2 C. & K. 31, is directly in point. The law is very fully discussed in

the notes, and Lord Holt's words quoted, "Damage feasant is the strictest distress there is, for the thing distrained must be taken in the very act; for if they are once off, though on fresh pursuit, you cannot distrain them. If tender be made of damages before the taking, the taking is unlawful." They must be actually doing damage, and are only distrainable for the damage they are then doing; *Clement v. Milner*, 3 Esp. 95, Lord Eldon's decision; Coke, Litt. 161a, the beasts must be damage feasant at time of distress; *Hoskins v. Robins*, 2 Saund. 328. This case in 2 C. & K. is cited as good law in the last edition of *Woodfall*, already cited.

The remaining question is as to jurisdiction.

I see no question of title, in the sense I understand it to be used in reference to the County Courts. The question here is not who owns this land, but whether Staples, the owner, gave defendants such an interest as entitled them to impound these cattle. It is a question of the construction of the agreement—what was demised? or if nothing was demised, what privilege was granted?

Non tenuit was always allowed to be pleaded in the County Court. In one sense, such a plea might and did raise a question of title, but not necessarily any thing in the sense in which I understand the word to be used by the Legislature. I see no objection to the County Court trying such a question as whether a particular parcel was included in a lease, or whether a person occupied or did not occupy one parcel, and questions of that character.

I think the appeal should be dismissed.

BURTON, PATTERSON, and OSLER, J J.A., concurred.

Appeal dismissed, with costs.

RE MCDUGALL.

Promissory note—Waiver of presentment and notice—Interest—C. S. U. C. ch. 42, sec. 13—Debt—Damages—Usage.

A promissory note was dishonored at maturity, but was not protested by the holders (a banking corporation) because of a waiver by the indorsers of presentment and notice.

Held, that the indorsers were not liable to pay interest thereon as a debt. Nor could a contract to pay interest be deduced from a usage of banks to charge interest on overdue debts, and to collect it if possible.

Semble, the indorsers would be liable to pay interest as damages for breach of their contract.

THIS was an appeal from the County Judge of Carleton in an insolvency matter, and came on to be heard before the Hon. Mr. Justice Patterson on the 4th December, 1885.

The facts fully appear in the judgment.

Lash, Q.C., for the appeal.

Gormully, contra.

December 7, 1885. PATTERSON, J. A.—After paying all the creditors of the firm of McDougall & Brother their principal debts for which they proved as of the date of the insolvency, a surplus of the joint estate remains, as shewn in the case, *Re McDougall*, 8 A. R. 309.

One of the joint creditors is the Merchants Bank, whose proved debt of \$3,289.30 has been paid in full, and the bank now claims payment of a large sum for interest for the time, since the date of the insolvency, before the appropriation of the surplus to the insolvents or their separate creditors.

The assignee has disallowed the claim for interest, and his decision has been overruled on a contestation before the learned Judge of the County Court.

From the latter decision the assignee, in the interest of the separate creditors of J. L. McDougall, has appealed to this Court.

The question turns principally, if not altogether, on the application to the facts of this claim of the judgment in

Re McDougall, 8 A. R. 309, where we decided that the joint creditors were entitled to be paid, in addition to the amounts due as of the date of the insolvency, subsequent interest on the amounts, whenever such interest was properly claimable as a debt, and not as damages only.

It was urged on the argument of this appeal, that the point decided in the former appeal was only that the interest was to be paid before handing over the surplus to the insolvents, and that there was no adjudication with regard to the separate creditors.

That is, however, a misapprehension of the effect of the decision. The separate creditors of J. L. McDougall—the other partner having no separate creditors—were represented before us. The adjudication was concerning the right of the joint creditors in the joint estate; and although in the judgment delivered the ultimate surplus may sometimes be spoken of as to be “handed over to the insolvents,” that expression must be understood with reference to the matter in discussion, and as referring to the appropriation of the separate shares of the surplus after paying the legal claims of the joint creditors, whether any such separate shares became payable to the insolvent personally, or to his assignee for the benefit of his separate creditors.

The important question is, whether the interest now claimed can properly be treated as a debt.

The proved claim of the bank was for the amount of a promissory note, made by J. L. McDougall, payable to the order of McDougall & Brother, and indorsed by the firm, by the hand of J. L. McDougall, to the bank.

In the ordinary routine of business the note would have been protested for non-payment, and in that case it would, under C. S. U. C. ch. 42 sec. 13, have been subject to interest from the date of the protest.

A protest would not have been necessary to fix the indorsers. Presentation and notice of dishonor would have sufficed; but as a matter of routine the note would doubtless have been protested, had it not been that when negotiating the note with the bank Mr. McDougall had, in

the name of his firm, indorsed upon the note a waiver of presentment and notice.

Thus it happened that there was no protest, and the interest could not be claimed under the statute as a debt.

But it is urged that evidence was given, from which a contract to pay interest after the maturity of the note ought to be deduced, and that the learned Judge in the Court below having found that there was such a contract, his decision ought not to be disturbed.

The bank manager with whom the note was negotiated was examined, as was also Mr. McDougall who negotiated the note.

Nothing whatever passed between them on the subject of interest; but what is depended upon is an alleged usage of the bank to charge interest on overdue notes, and an implied contract with reference to that usage.

It is not necessary to consider how far such usage could be allowed to be set up when we have the subject dealt with by statute, because the evidence appears to me to fall short of stating more than that the banks collect interest, when they can, upon all overdue debts.

The bank manager was asked: "Is there any usage among bankers in Canada as to charging interest on overdue paper?" and he answered: "There is such a usage, and it makes no difference whether it is the maker or the indorser."

Then another banker was called. He is reported as saying: "There is a usage among bankers in Canada to charge interest on overdue paper from the maturity thereof; it makes no difference who pays the money, maker, indorser, or acceptor;" and then he shews on cross-examination that he is speaking, not of mercantile paper specially, but of all debts. The note of his evidence is: "The bank certainly try to collect interest on all matured paper and moneys due them, whether the law gives it to them or not."

This is the whole evidence of the alleged usage, and it cannot in my opinion be fairly held to amount to more than that bankers are in the habit of charging interest on

overdue debts and collecting it when they can. In certain cases the law gives a right to interest, and it then becomes a debt. It is not unusual to see a notice in a bank office that interest will be charged at a certain rate on overdrawn accounts, and customers overdrawing after that notice may reasonably be taken to accept its terms. In other cases interest may be allowed as damages, and probably would as a general rule be allowed by court or jury. There would be nothing unlawful in either the demand or payment of such interest. It would as a rule be a reasonable demand, and it would be a very exceptional case in which it would be refused; but it would not for these reasons become demandable as a legal right, or in the character of a debt.

The witnesses here do not assert that what is put forward as a usage is anything more than this common mode of doing business, nor that it is peculiar to bankers

The position, as I should take it to be from the evidence of the bankers themselves, is precisely that which is put by Mr. McDougall in his evidence. He said: "I did not know of any particular usage as a usage in regard to charging interest on overdue paper. I knew the banks always charged me interest, and I expected to pay interest on overdue amounts and on this note."

We could scarcely support the inference of a contract to pay interest in this case upon any ground that would not equally apply to the bulk of trading transactions in which debts are incurred, whether dealings with mercantile paper or ordinary shop accounts.

It may seem unfair, as between the bank and other creditors of the insolvent firm, that it is excluded from the class to whom, under our former decision, interest was payable, by the accident of presentment and notice being waived. The indorsers in that waiver undertook the same liability as if the acts which they waived had been done. But there is not any sound basis on which the effect of the waiver can be carried further than that, having regard to the fact that the acts that were waived were all

that were necessary to fix their liability to pay the note.

They would nevertheless be liable to pay interest after the maturity of the note, though not as a debt for which the bank could rank in the insolvency proceedings. The law is thus stated in Byles on Bills, at p. 305 of the 11th edition : "The indorser of a bill or note has been held liable to pay interest only from the time that he receives notice of the dishonor. 'The drawer cannot,' says Mansfield, C. J., 'find out by inspiration who is the holder, and till he finds that out he cannot pay the bill. When he has found out who is the holder, he is bound to pay the bill within a reasonable time. If he does not he is liable to damages for not performing his contract ; those damages are the interest on the bill :' *Walker v. Barnes*, 5 Taunt. 240."

I have referred to the authorities cited on the argument, and also, amongst others, to some of those noted in *Robinson & Joseph's Digest* in column 266, under "Attachment of Debts," and column 1885, *et seq.*, under "Interest of Money," without finding support for the contention of the bank.

I must allow the appeal, with costs ; and I see no sufficient reason why the costs of the contention in the Court below should not be paid by the Merchants Bank.

MACDONELL V. ROBINSON.

Libel—Defence—Privilege—Demurrer.

In an action of libel paragraphs 3 and 4 of the defence set up that the alleged libel was published on a privileged occasion; the ground of privilege being that it was a fair and *bond fide* comment upon a matter of public and general interest, which had become such by means of the plaintiff's own appeal to the public through the medium of the press, inviting public attention to his professional character and position; and challenging public criticism upon his conduct in connection with all the matters referred to in the alleged libel, which was printed and published by the defendant *bond fide*, for the public benefit, and without malice.

Held, [affirming the judgment of ROSE, J., 8 O. R. 53] a good defence. *Farmer v. The Hamilton Tribune Co.*, 3 O. R. 538, and *Murphy v. Halpin*, Ir. R. 8 C. L. 127, distinguished.

THIS was an appeal by the plaintiff from the judgment of ROSE, J., (8 O. R. 53) overruling the plaintiff's demurrer to the 3rd and 4th paragraphs of the statement of defence in an action of libel.

The substance of the pleading demurred to is set out in the judgment.

The appeal was heard on the 27th of May, 1885.*

Falconbridge, for the appellant.

Wallace Nesbitt, for the respondent.

June 23, 1885. OSLER, J. A.—Under the system of pleading introduced by the Judicature Act, I think the statement of defence is not open to objection.

Rule 128 of the O. J. Act requires that every pleading shall contain a concise statement of the material facts on which the party pleading relies. The substance of this defence is that the alleged libel was published on a privileged occasion; the ground of privilege being that it was a fair and *bond fide* comment upon a matter of public and general interest, which had become such by means of the plaintiff's own appeal to the public through the medium of the press, inviting public attention to his professional character and position, and challenging public criticism upon his conduct in connection with all the matters referred to in

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the alleged libel, which was printed and published by the defendant *bonâ fide*, for the public benefit, and without malice.

Under the former system of pleading, any defence founded on privilege was provable under the plea of "not guilty," and it was neither necessary nor proper to plead it specially.

A plea similar to the defence now in question was pleaded without objection in *Odger v. Mortimer*, 28 L. T. N. S. 472 (1873) referred to by my brother Rose. There was also a plea of "not guilty," on the record.

Bovill, C. J., said: "The jury * * would look at all the circumstances, and the circumstances point to this—that Mr. Odger (the plaintiff) is essentially a public man."

And per Denman, J.: "It was for the jury to say whether the comment went beyond what was fair and right. * * My judgment is founded on the assumption that the jury found their verdict (for the defendant) upon the plea of not guilty."

In *Davis v. Duncan*, L. R. 9 C. P. 396, the libel complained of (a newspaper article) charged the plaintiff, a clergyman, with misconduct at a public election meeting: that appearances were consistent with the belief that he imbibed rather freely of the cup that inebriates: that persons present were anxious to give him some punishment, which he unquestionably deserved, and that it was to be hoped he would receive such a reprimand from his superiors as would prevent similar disgraceful occurrences.

The defendant pleaded not guilty and a justification.

One question left to the jury was, whether the statement exceeded the limits of a fair and *bonâ fide* discussion by a writer in a public newspaper of a matter of public interest. This was held to be a proper direction, though the plaintiff had not gone to the meeting in a public capacity, or intended to take any part in it.

See also *Kelly v. Tinling*, L. R. 1 Q. B. 699, where it was held, that the conduct of the incumbent of a church was a matter of public interest which might be made the subject of public discussion.

In *Purcell v. Sowler*, 1 C. P. D. 781, Brett, J., says that *Kelly v. Tinling* has perhaps gone further than any case upon the subject.

What is a matter of public interest, so as to be properly open to free and fair comment, embraces a large class of subjects.

In *Odgers* on Libel and Slander, pp. 50, 51, authorities are referred to which fully bear out the statement that "when a man comes prominently forward in any way, and acquires for a time a *quasi* public position, he cannot escape from the necessary consequence, the free expression of public opinion. Whoever seeks notoriety, or invites public attention, is said to challenge public criticism; and he cannot resort to the law courts, if that criticism be less favorable than he anticipated:" *Hunter v. Sharpe*, 4 F. & F. 983, 1005; *Paris v. Levy*, 9 C. B. N. S. 342; *Seymour v. Butterworth* 3 F. & F. 372.

These authorities are sufficient to shew that the defence upon the facts alleged in the pleading, is sufficient in law. It covers, as pleaded, the whole of the alleged libel. It will be for the Judge at the trial to determine on the proof adduced in support of it, whether all the matters it refers to had become of general interest in the manner and from the cause alleged, and the jury will then have to determine as a question of fact whether the defendant's comments have exceeded the limits of fair and reasonable discussion, or temperate criticism thereon.

The cases of *Farmer v. The Hamilton Tribune Co.*, 3 O. R. 538, *Murphy v. Halpin*, Ir. R. 8 C. L. 127 (1875), are very distinguishable from the present, as the pleading in the one and facts in the other failed to shew that the subject of the libel was in itself a matter of public or general interest, or that the plaintiff had made it so by any challenge or appeal on his part to public opinion.

I think the appeal should be dismissed.

HAGARTY, C. J. O., BURTON, and PATTERSON, JJ. A., concurred.

Appeal dismissed, with costs.

THE CORPORATION OF THE CITY OF ST. THOMAS v. THE
CREDIT VALLEY RAILWAY COMPANY.

Bonus—Railway—Agreement—Specific performance—Damages.

In consideration of a bonus granted by the plaintiffs to the defendants the latter agreed (1) to bring their railway from Ingersoll to some point on the line of the Canada Southern Railway not more than half a mile east of the present passenger station of the Canada Southern Railway at St. Thomas, and (2) to run all their passenger trains to and from a small station on Church street. The defendants performed the first part of the agreement, and also the second, so long as the Canada Southern R. W. Co. permitted the use of their line from the point of junction to the small station on Church street; but on the refusal of the other company to continue this privilege, the defendants discontinued the performance of this part of their agreement.

Held, [affirming the judgment of FERGUSON, J.,] that this was not a case in which the defendants should be directed specifically to perform their contract as to the Church street station, but that the plaintiffs were entitled to a reference as to damages for breach thereof.

THIS action was brought for specific performance of an agreement entered into between the Railway Company and the City, whereby the company agreed for the consideration of \$50,000 in debentures of the city, to "run their railway from the town of Ingersoll to the Canada Southern Railway at some point not more than half a mile east of the present passenger station of the Canada Southern Railway at St. Thomas, and that all the passenger trains of the Credit Valley Railway Company should run to and from a small station on Church street for the purpose of checking baggage and the accommodation of passengers."

In pursuance of this agreement the debentures were duly delivered to the Railway Company, and the company did run their railway from Ingersoll to St. Thomas, and for a brief period they ran their passenger trains to and from a small station on Church street, not laying a track of their own, but utilizing that of the Canada Southern Railway, by a subsequent arrangement to which the city was not a party; but later they wholly discontinued to run trains to and from a small station on Church street, thereby committing the breach complained of.

The action was tried by Ferguson, J., who refused to enforce the plaintiffs' claim for specific performance, but held that the Railway Company had committed a breach of the agreement, and directed a reference as to the damages sustained by reason thereof.

The plaintiffs appealed from so much of the learned Judge's judgment, as refused specific performance of the agreement.

The appeal was heard on the 16th and 17th of March, 1885.*

McCarthy, Q. C., and *Plumb*, for the appellants.

Robinson, Q. C., and *G. T. Blackstock*, for the respondents.

April 17th, 1885. HAGARTY, C. J. O.—Two considerations are set out in the contract for the municipality granting a bonus of \$50,000 to the company. The first is, that the railway shall be brought from Ingersoll (a distance of twenty-five to thirty miles) to the Canada Southern Railway, at a point not more than half a mile east of the present passenger station of the Canada Southern Railway in St. Thomas; (2) and that all the passenger trains of defendants will run to and from a small station on Church street regularly after the said railway shall have been opened for traffic, for the purpose of checking baggage and the accommodation of passengers.

The language of the contract must, of course, govern; but we cannot avoid looking at the existing facts and circumstances at the time the contract was made. The defendants brought their road from Ingersoll to the point indicated on the Canada Southern Railway. There the defendants' line stopped. It was, of course, perfectly well known to all the contracting parties that the defendants running trains anywhere beyond that point must be over the Canada Southern Railway.

The defendants duly performed the first part of their contract. For about a year, by arrangement with the

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Canada Southern Railway, they ran to the small station on Church street belonging to the latter company, and then, according to the evidence, the Canada Southern Company refused to allow them to continue so to do.

There is no power to compel the Canada Southern Railway Company to give this permission. It seems to be by their license that the defendants' trains run from the point of junction into the station in St. Thomas. The words of the contract, that all passenger trains should run to a small station on Church street "regularly after said railway (defendants' road) shall have been opened for traffic," clearly point, as I think, to only a user of the existing Canada Southern Railway, as no other line was existing or contemplated, when the Credit Valley road should be opened for traffic.

I see little consequence in the alteration of *the* small station to *a* small station. Under the use of either expression the parties could not, as I read it, mean any thing but the station in existence on Church street, or at all events at or on the existing Canada Southern line.

I think it clear that the defendants, in consideration of the bonus obtained, are bound to give the plaintiffs all they agreed to give them, or if they cannot specifically give all, they are liable to pay damages for the loss of what they fail to give.

I cannot accept the defendants' views, urged as an objection by way of cross appeal, that the defendants are not responsible, inasmuch as the refusal of the Canada Southern Company to allow the user of their road was a matter wholly unforeseen and wholly beyond their control, and without any intentional or avoidable default on their part. If the defendants had, as a consideration for obtaining this \$50,000, covenanted, in terms, that they would obtain running power over the other road, or express permission to run trains to the Church street station, I think their inability to obtain such power or consent would not absolve them from liability for damages.

There is a well-known distinction as to liability where

performance becomes impossible from the perishing or cesser of existence of the property or person, respecting which or whom something is to be done.

Many of the authorities are reviewed in *Chamberlen v. Trenouth*, 23 C. P. 497, and in the elaborately argued cases of *Taylor v. Caldwell*, 3 B. & S. 826; *Hall v. Wright*, El. B. & El. 746; *Howell v. Coupland*, 1 Q. B. D. 258. The head-note in *Taylor v. Caldwell* fairly gives the result.

“Where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled, unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.”

The judgment of Blackburn, J., is very full. He says (p. 833): “There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthen-some or even impossible.”

I do not think that this class of cases can affect the plaintiffs' right.

I have examined the authorities. relied on by plaintiffs and have come to the conclusion that my learned brother Ferguson rightly held that this is not a case in which the defendants should be directed specifically to perform their contract as to the Church street station.

Such a decree would compel them in effect to build a new railroad from or about their point of intersection with the Canada Southern to some point on Church street—anywhere, in fact, on Church street, possibly at some distance from the small station on the Canada Southern Railway in existence at the making of the contract, and pos-

sibly the obtaining of further Parliamentary authority and a large expenditure of money, as far as we can conjecture, wholly disproportionate to the object to be attained.

The cases shew that the companies can be compelled specifically to perform contracts to erect stations, sidings, etc., etc.; to stop their trains at named points, etc., etc. But in such cases they had the power to do so, and it was always on their own land or on land available for the purpose.

The case of *Attorney-General v. Mid Kent R. W. Co.*, L. R. 3 Ch. 100, relied on by plaintiffs, was very different. There the obligation was by their charter to limit the slope on approach to bridges to one in thirty feet. The making of such a slope required an encroachment on the land of a person, who obtained an injunction against their so doing. In consequence they made the slope one in twenty. Held that it was no answer to an information to say that they could not comply with the Act without closing their railway. If the company could not make their road in conformity with the Act the conditions of their existence as a road would not be complied with. So the courts of law would interfere by mandamus to compel companies to follow the positive requirements of their charters.

I have seen no case in which a company has been ordered specifically to perform a contract which would involve the building of another line of railway.

It seems to be clear that performance shewn to be beyond the power of the defendants will not be decreed. The cases are noticed in *Fry*, ch. 23, "On the incapacity of defendant to perform his part of the contract;" *Fry*, 2nd ed., 1881, p. 430, especially sec. 970.

Lord Selborne, in *Wilson v. Northampton, &c. R. W. Co.* L. R. 9 Ch. 272, 284, says: "The principle which is material to be considered in the present case is, that the Court gives specific performance instead of damages, only when it can by that means do more perfect and complete justice. An agreement, which is not so specific in its terms or in its nature as to make it certain that better justice

policy ; or whether the defendants were discharged as by ratable payment under the 5th statutory condition (R. S. O. ch. 162), which declares that in case of the removal of the property to escape conflagration the company will ratably contribute to the loss and expenses attending such act of salvage ?

OSLER, J. A., held that the plaintiff was entitled to recover the full amount of the policy, and gave judgment for \$1,000 and interest.

The appeal was heard on the 8th of May, 1885.*

Robinson, Q. C., and W. A. Reeve, for the appellants. But for statutory condition No. 5, the company would not be liable for any part of the loss, and that condition only imposes a liability to contribute ratably with the assured in respect of the loss. In framing this condition, the intention of the legislature was to settle what the liability of the company should be for a loss of this nature, and the condition should alone be taken as a guide in determining the liability.

Moss, Q. C., and Falconbridge, for the respondent. The damage is covered by the policy, the fire having been the proximate cause. The condition referred to imposes an additional liability upon the company.

The authorities cited are referred to in the judgments.

May 26, 1885. HAGARTY, C. J. O.—The weight of opinion and authority seems to be in favor of the view taken by my brother Osler, from whose judgment is this appeal.

Our own case of *Thompson v. Montreal Insurance Co.*, 6 U. C. R. 319, is clear in favour of the view that goods lost in course of removal to escape conflagration are considered as lost by fire, as the proximate cause.

This seems to be assumed as the law in *Levy v. Baillie* 7 Bing. 349. The plaintiff, an upholsterer, swore to a lost over the amount of the policy : that the loss was sustained

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as to a small amount for goods injured in process of removal, and a large amount "abstracted" by the crowd assembled at the fire.

The defence was fraud and false swearing on this proof. At the trial evidence was given of the loss, and the company defended on the ground that such a quantity of goods could not have been, and were not stolen. The case went to the jury wholly on that question. They found for the plaintiff, and the following term a new trial was, after argument, granted on the weight of evidence. Neither at the trial nor in term was any question raised as to liability for goods so stolen or lost.

In the last English work on this subject, *Porter on Insurance*, pp. 119-122, the law is stated, in accordance with what we assume it to be. Our case of *Thompson v. Montreal Insurance Co.* and a Lower Canada decision are cited, and the case in 7 Bing. 349, as apparently assuming such to be the law.

A meaning can be given to the clause in our statutory condition as to the ratable contribution, by applying it to the cost and expenses and consequent loss to the assured occasioned by the removal.

In the shape in which the appeal is before us, we are not called on to discuss the question, whether any independent engagement or obligation to contribute ratably, over and above the amount insured as for direct loss, may be created by the words used in the statutory condition.

BURTON, J. A.—I think the judgment below is undoubtedly right, and ought to be affirmed.

The policy upon its face entitles the assured to be made good, to the extent of \$1,000, whatever loss or damage he may suffer by fire to the property insured, which has always been held to include damages resulting from *bond fide* efforts to save property from the fire, as by water or removal, every loss in fact that clearly and proximately results directly or indirectly from the fire, unless specially excepted.

I regard the fifth condition not as any exception to or qualification of the risk, but an independent agreement for the benefit of the assurers, and an inducement to the assured to use every exertion to save the property insured, by holding out to him the advantage of being proportionably reimbursed in the expenses he may incur in such removal, the words, "loss or expense attending such act of salvage," having reference, not to the loss or damage to the goods themselves which are already covered by the policy, but to the expenses incurred in the act of salvage.

I look upon it as an agreement wholly outside of, and in addition to their actual contract of assurance, and although it does not become necessary to decide the point in this case, I may state it as my individual opinion, that the company might be called upon to contribute to such expenses, even although they were also called upon to make good the full amount insured, in other words, in excess of the insurance.

Assume, for instance, as a test, that the insured had his goods of the value of \$10,000 insured for \$5,000, and succeeded in removing them without injury at an expense of \$200. The insurer would have to contribute \$100 to the expense of salvage, which he might be well content to do as the removal had saved him a loss of \$5,000, but I do not understand that that payment would go in reduction of the sum insured, so that in the event of a subsequent loss the sum recoverable would be \$4,900 in place of the original \$5,000. The point is not, however, before us for consideration, and I merely refer to it because something was said during the argument about the insurers not being liable to contribute to these expenses, in the event of their being called upon to make good the full sum insured for goods actually lost. In that opinion I do not agree, but the actual loss to the property insured here exceeded \$1,000, and I agree that the judgment is properly given for that amount, and that the appeal should be dismissed, with costs.

Since writing the foregoing judgment, I find that Mr. Bunyon, in his work, treats it as settled practice and

settled law for the companies to contribute to these expenses in excess of the sum assured.

PATTERSON, J. A.—I agree that the appeal must be dismissed. I merely desire to say that I am not prepared to hold that the loss or expense incurred in saving goods can be additional to the amount of the policy.

Were it necessary to consider the matter, which at present is not the case, there are considerations to the contrary which may perhaps be found of a good deal of weight.

The company is to contribute *ratably*. What is to be the ratio? Are the companies and the owner to pay in equal shares, or in the ratio of their respective interests in the goods?

If the latter, or indeed in either alternative, how will it be in a case in which goods to the full amount of the policy or policies are actually destroyed by fire, so that the owner alone is interested in those that are saved?

Views of this kind would have to be discussed before deciding that the loss or expense incurred in salvage can be added to the amount in respect of which the premium is calculated.

GALT, J., concurred.

Appeal dismissed.

McCARTHY V. COOPER AND OLIVER.

Sale of land—Specific performance—Contract—Statute of Frauds—Reading connected documents together—Ineffectual conveyance an evidence of contract.

C. verbally agreed with an agent of W. at Toronto to buy land in Manitoba, paying the agent ten per cent. of the purchase money, and taking his receipt therefor. C. signed the receipt as a witness, made an affidavit of execution, and registered it, in order, as he swore, to bind the bargain. The vendor's name did not appear in the receipt, but there was a reference in it to a telegram sent to the vendor, which was produced and shewn to be addressed to W. The plaintiff was the owner of the land, W. being merely his agent, but W. subsequently executed in his own name a conveyance of it to C., who also signed it. *Held*, that the affidavit made by C., the receipt and the telegram could be read together, and when so read constituted evidence of a contract sufficient to satisfy the Statute of Frauds; and that the receipt could not be objected to as evidence because of a mistake in it as to the price, which was subsequently corrected in the deed. *Held*, also, [affirming the decision of FERGUSON, J., 8 O. R. 316] that the deed executed by W. was sufficient to satisfy the statute, although ineffectual as a conveyance.

THIS was an appeal by the defendant Cooper from the judgment of Ferguson, J., (8 O. R. 316) adjudging the plaintiff entitled to specific performance of a contract entered into by the defendant Cooper, for the purchase of land in Manitoba from the plaintiff.

The facts appear in the report of the case in the Court below, and in the present judgment.

The appeal was heard on the 15th of May, 1885.*

Black, for the appellant.

W. Cassels, Q. C., and *G. T. Blackstock*, for the respondent.

June 23, 1885. HAGARTY, C. J. O.—As I understand the evidence, Wood had been trying to sell this land for Corbin, communicating with defendant Oliver in Toronto.

On the 8th March McCarthy purchased Corbin's interest, and at once employed Wood to act for him in the sale, and

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sent him to Toronto. It would seem that the plaintiff had some previous interest in the land with Corbin, for, on affidavits of plaintiff and of Corbin, up to March 8th all Wood's instructions had come from Corbin, after that from McCarthy, the plaintiff, as sole owner.

Prior to the plaintiff's employment of Wood, the defendant Cooper was negotiating with the defendant Oliver for the purchase, and on the 4th March, and again on the 7th March, Oliver telegraphed offers respectively of \$4,000 and \$5,000. On the 8th March, Wood telegraphed from Winnipeg to Oliver, "Accept offer, will be down."

It appears that the defendant Cooper himself sent these two telegrams in Coate & Co.'s name, with their assent, addressed to Wood at Winnipeg. Cooper was very anxious to secure the land, and was willing, as he told Oliver, to advance offer to \$6,000. When Wood's answer came accepting, the defendant and Oliver at first thought it was in answer to the offer of \$6,000, but it turned out to be an acceptance at \$5,000.

The defendant Oliver gave the defendant Cooper this receipt :

"Received from W. J. Cooper, Esq., his cheque for the sum of six hundred dollars, being ten per cent. of purchase money on purchase of block 17, in N. E. $\frac{1}{4}$ section 15, township 10, range 19 west, 'Brandon,' Manitoba, containing (40) lots, the said lots having been purchased on the following terms, viz., one-half cash, balance in five months on mortgage at seven per cent., as per our telegram to the vendor.

"For the vendor,

"F. W. COATE & Co."

TORONTO, 9th March, 1882.

Witness: "W. J. COOPER."

It will be observed that Cooper signs it as a witness, although he is stated in it as paying the 10 per cent. of purchase money. He at once made affidavit of its execution, and sent it up to Winnipeg for registration.

It is objected that the vendor's name does not appear. "For the vendor" has been held to be insufficient under the statute.

But here the receipt contains the words, "as per our

telegram to the vendor." We can look at this telegram, and we find it addressed to Wood as the vendor, and actually so filled in, and sent to the vendor by the defendant himself. I think this is sufficient, and within the principle of Sir Geo. Jessel's decision in *Commings v. Scott*, L. R. 20 Eq. 11, 16.

At the time of the giving of this receipt Wood was acting as agent for the present plaintiff in the sale of the land.

I hardly understand why on the 14th March, after Wood had been acting for the plaintiff, he should execute a formal conveyance of the land from himself (as if he were the owner) to the defendant. The defendant signs it also.

I do not see how we can refuse to take this deed as evidencing clearly a purchase by the defendants from Wood of a property, for which Wood was at that time the agent of the plaintiff.

If it was merely a formal contract of sale and purchase between Wood and the defendant, on the face of it appearing as if Wood were the vendor, the law seems clear that if he were then the agent of the plaintiff, the Statute of Frauds would be fully answered.

The law is clearly laid down in such cases as *Higgins v. Senior*, 8 M. & W. 834, fully recognized and stated by Lord Cairns in *Rossiter v. Miller*, 3 App. Cas. at p. 1141.

The point is fully discussed in *McClung v. McCracken*, 3 O. R. 596, 600, and other cases are cited.

If a contract of sale so made were sufficient, it appears to me impossible that a deed between the agent and the purchaser, signed by the latter, can be held not to contain all the particulars required to satisfy the statute.

As to the defendant Cooper signing the receipt given by the defendant Oliver, he says very distinctly that he signed it as a witness for the purpose of registration, he swore to its execution, and sent it up to be recorded, and he says he did this to hold or bind the property, as he had been informed that the vendor was not a very responsible person.

It seems to throw a rather ludicrous light on the Statute of Frauds, if a person taking a receipt shewing the contract

of sale to himself, should put his name as a witness, swear that he was present, and was a subscribing witness, get it recorded to bind the bargain, and then say he had never contracted in writing. If he had written a letter, stating that he was present and saw the defendant Oliver sign this receipt to himself, setting out its terms, would not the letter be taken as evidence against him under the statute? I think it would.

In the well known case of *Caton v. Caton*, L. R. 2 H. L. at p. 144, Lord Westbury speaks of "the process of incorporating into a letter or a memorandum signed by a party another document which is specifically referred to by the terms of the memorandum so signed, and which by virtue of that reference is incorporated into the body of the memorandum."

I think the affidavit of the defendant here comes clearly within that description. The defendant Cooper admits that after he got the deed from Wood he offered the property for sale to several persons; also that the defendant Oliver refunded to his solicitors the 10 per cent. on the \$1,000 erroneously put in the receipt over the true price agreed on. The deed contains the true price.

I do not see any objection to the receipt as evidence under the statute, merely because there was this mistake as to the price, which was promptly corrected, and the true price stated in the subsequent conveyance.

We have seldom a case before us in which the contract sought to be enforced has been more clearly shewn by the acts and written acknowledgments of the parties.

I am of opinion the defence fails, and the appeal should be dismissed.

BURTON, PATTERSON, and OSLER, JJ. A., concurred.

Appeal dismissed, with costs.

SMITH V. THE PORT DOVER AND LAKE HURON
RAILWAY COMPANY ET AL.

*Receiver—Railway—Application of earnings—Acquisition and lease of road
—Duty of court.*

The plaintiff, a judgment creditor of the P. D. & L. H. R. W. Co., claimed in this action to have a receiver appointed in order to enable him to obtain equitable execution of his judgment by receiving the share of the P. D. & L. H. R. W. Co. of the earnings of the L. E. R. W. Co., who had acquired the road of the P. D. & L. H. R. W. Co., and had put it in possession of the G. T. R. W. Co. as lessees. The whole surplus earnings of the P. D. & L. H. R. W. Co. were by statute made applicable, and were being applied by the G. T. R. W. Co. towards reducing the incumbrances, the interest on which they were insufficient to pay.

Held, that in the appointment of a receiver the court acts only upon a proper case being made out for the exercise of its jurisdiction, according to well established principles, and in that sense only can a receiver be said to be *ex debito justitiæ*, whether the application be interlocutory or made at the hearing, whether the appointment of the receiver is the sole object of the action or only incidental to other relief, and whether the relief is sought at the instance of a judgment creditor, or of any one else.

Under the circumstances appearing in this case the Court affirmed the judgment of FERGUSON, J., 8 O. R. 256, refusing the appointment of a receiver.

THIS was an appeal by the plaintiff from the judgment of Ferguson, J., (8 O. R. 256) dismissing the bill, which was filed by the plaintiff on behalf of himself and all other creditors of the Port Dover and Lake Huron R. W. Co., praying for the appointment of a receiver to receive the assets of these defendants for the purpose of paying the claims of their creditors.

The facts and authorities cited are set out in the former report and in the present judgment.

The appeal was heard on the 28th of April, 1885.*

W. Cassels, Q. C., for the appellant.

Moss, Q. C., for the respondents.

June 23, 1885. OSLER, J. A.—This was a bill filed before the passing of the Ontario Judicature Act to obtain

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equitable execution of the plaintiff's judgment at law, by means of the appointment of a receiver, and the question presented for decision substantially is, whether in the circumstances the judgment creditor is entitled to a receiver *ex debito justitiæ*, the argument being that his right to that relief stands on as high a ground as his right to a writ of *fiery facias*, or any of the ordinary forms of execution, which are issued as of course, without regard to the question whether anything will be realized under them or not.

In *Kerr on Receivers*, 2nd ed., p. 44, it is said: "A judgment creditor who has sued out execution on his judgment, but finds himself defeated by a prior title extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed, and so precluded from obtaining execution, or the benefit of an *elegit* or *fi. fa.*, has a right to come to the Court for the appointment of a receiver of the proceeds of the estate of the debtor." See also *Bennett on Receivers*, p. 59.

"An ordinary judgment creditor of a railway or canal company has a right, as between himself and the company, to go into possession of the land and, not interfering with the working of the canal or railway, to take the profits realised by its use in the only way in which the responsibility imposed by the legislature on such companies for the benefit of the public allow them to use it, and in the assertion of that right to have the protection of a Court of Equity, by the appointment of a receiver of the tolls and traffic receipts." *Kerr*, p. 50; *Furness v. Caterham R. W. Co.*, 25 Beav. 614.

It is laid down as a rule of general application that "the appointment of a receiver is a matter resting in the sound discretion of the Court. In exercising its discretion the Court proceeds with caution, and is governed by a view of the whole circumstances of the case." *Kerr*, p. 3; *Smith on Receivers*, p. 1; *Pomeroy's Equity Jurisprudence*, sec. 1331; *Owen v. Homan*, 4 H. L. Cas. 997; *Daniell's Chancery Practice*, 6th ed. 1664.

The Judicature Act, sec. 17, sub-sec. 8, provides that a receiver may be appointed by an interlocutory order in

any case in which it shall appear to the Court to be just or convenient that such order should be made, and it may be made either unconditionally, or upon such terms and conditions as the Court shall think just.

Whether the application is interlocutory, or made at the hearing (and the late Sir Geo. Jessel observed in a case I shall presently refer to, that every case on the subject with which he was acquainted was a case in which the application was made upon an interlocutory motion before the hearing), whether it is incidental to other relief, or is, as here, the sole object of the action, and whether at the instance of a judgment creditor, or of any one else, the Court acts only upon a proper case being made out for the exercise of its jurisdiction, according to well established principles.

It is in that sense only that a receiver can be said to be *ex debito justitiæ*.

In the *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275, which was an action by a judgment creditor for the appointment of a receiver of the estate of the debtor, who was mortgagor in possession, the late Master of the Rolls said, (p. 283) speaking of the practice before the Judicature Act on a creditor's application for equitable execution :

"According to the practice the application for the receiver was made by interlocutory application before the hearing, and in a proper case it was granted. * * It ought to be granted in every proper case. In dealing with such an application the first point to be considered was, whether there was an undisputed judgment. * * The next point was: Has the defendant got the land? because he might say, 'Do not appoint a receiver of somebody else's land; I am not in possession; I have nothing to do with it.' * * When those two points were answered the third point was: 'Is the interest of the debtor in the land such that it cannot be reached at law?' If that was answered in the affirmative * * it seems to me that the order should be of course." See also *Hopkins v. Worcester and Birmingham Canal Proprietors*, L. R. 6 Eq. at p. 447.

As against a prior mortgagee or incumbrancer in posses-

sion, a receiver will not as a general rule be appointed : *Kerr*, 34 ; *Daniell*, 1665, 1666.

In *Redfield on Railways*, vol. 2, p. 363, it is said : " The rule in courts of equity in regard to appointing a receiver of mortgaged property is, that it will be granted in all cases where the income of the estate is required to meet the incumbrance, and is at the present time being so applied as not to be legally applicable to reduce the incumbrance."

There is no case in which the Court appoints a receiver merely because the measure can do no harm : *Orphan Asylum Society v. McCartee*, 1 *Hopkins*, N. Y. Ch. 429 ; *Blondheim v. Moore*, 11 Md. 365.

At p. 63 of the Weekly Notes for 1884, there is the note of a case of *I. v. K.*, in which it was said that a receiver will only be granted where the amount of the judgment warrants the expense, and there is fair reason to suppose that there is something to receive.

I have no doubt that the observation of the late Chief Justice of this Court, when Vice Chancellor, in the case of *Simpson v. The Ottawa and Prescott R. W. Co.*, 1 Ch. Chamb. R. 126, accurately expresses the duty of the Court in cases of this nature. He says (p. 128), " I agree that where the Court cannot interpose usefully it should not interfere at all, and that it should interfere only so far as it can interfere usefully."

In proceedings for the attachment of debts, where a new legal right was conferred by statute upon creditors, the Common Law Procedure Act, 1860, (Imperial) expressly gives the Judge a discretion to refuse to interfere, where, for any reason, the remedy sought would be worthless or vexatious.

This consideration, I apprehend, a Court always acts on when its jurisdiction is invoked by any one who has not an absolute right to its exercise in his favor, as, for example, in proceedings for mandamus and prohibition.

The case before us is very different from those in which a receiver has been appointed of a railway conducting its own business and carrying on its traffic arrangements in

the ordinary way, as for instance, in *Simpson v. Ottawa and Prescott R. W. Co.*, 1 Ch. Chamb. R. 126; *Peto v. Weland R. W. Co.*, 9 Gr. 455; *Fox v. The Toronto and Nipissing R. W. Co.*, 28 Gr. 212; *Lee v. The Credit Valley R. W. Co.*, 29 Gr. 480.

The case of *Re Manchester Railway Co.*, 14 Ch. D. 645, is a decision upon the right of a judgment creditor under the Companies' Act, 1867, and does not assist the plaintiff, for the reasons pointed out by my brother Ferguson.

The circumstances, under which the judgment creditor here asks for a receiver, are of a special and unusual character and it is necessary to refer to them in some detail.

The Port Dover and Lake Huron Railway Company was incorporated by 35 Vict. ch 53 (O). In October, 1877, the plaintiff recovered judgment against the company for \$5,109 upon their note, for the price of materials &c., supplied for the construction of the railway.

A large bonded debt then existed, which in point of date was prior to the plaintiff's judgment, and which by the Act of incorporation and amending Act of 40 Vict. ch. 74 (O), constituted in certain proportions a first and second preferential claim and charge upon all the property, real and personal, of the company.

The road was also then, and had been from the year 1874, in the hands of the bondholders, the interest on the bonds having fallen into arrear, and was being worked by them for their own benefit with the consent of the shareholders.

The revenue was not sufficient to pay the interest on the bonds, so that when the bill in this suit was filed it is manifest that the plaintiff was not entitled to the relief he now asks, or to have a receiver appointed as against the bondholders.

The arrangement referred to continued until the 10th April, 1880, when by agreement bearing that date, the Port Dover Railway, and the Stratford and Huron Railway were subject to a contemplated amalgamation, and changes con-

sequent thereon, leased to the Grand Trunk Railway Company for a term of twenty-one years.

Under this agreement both railways were operated by the Grand Trunk Railway Company, until the 22nd April, 1881, and the amount received from that company was paid to the bondholders, and applied in payment of working expenses not covered by receipts from the road while operated by them.

By an Act passed 4th March, 1881, 44 Vict. ch. 69, the Port Dover Railway, the Stratford and Huron Railway, and the Georgian Bay and Wellington Railway were amalgamated and formed into a new company called the Grand Trunk, Georgian Bay, and Lake Erie Railway Company; and all the powers, privileges, rights, claims, property, and effects of each of the amalgamated companies were vested in the new company, subject to the provisions of the Act.

These provisions, so far as they are important, are the following :

Section 4. The assets of each amalgamated company, including a share of any future assets of the company (the Lake Erie Company) earned by that portion of the line of the amalgamated company in the proportion the length of the latter (against which any claim or lien exists) bears to the whole length of the line of the former, shall continue liable to satisfy all claims, liens, &c., against the amalgamated company originally liable therefor, &c.; provided also, that the rights of any person having any special lien &c., upon the lands, buildings, tolls, or other property of either of the amalgamated companies shall not be affected; *save that they, and all liens and claims* mentioned in the section, shall be subject to the provisions of the Act regarding the issue of bonds by the company.

Section 35, sub-section 1, empowers the company to issue first and second preference mortgage bonds for the purpose of redeeming outstanding bonds of the Port Dover Company, the Stratford Company, and for the general purposes of the company, and to mortgage to trustees "such portion of the line of the railway and undertaking and such of the

lands, tolls, revenues, and other property of the company as may be mentioned in the mortgage.

Sub-section 2 limits the bond issue to £1600 sterling per mile in length of the railway constructed.

Sub-section 3 declares that mortgage to secure the first mortgage bonds shall be a lien and charge on the property embraced in it in preference and priority to all other charges thereon, and in like manner that the mortgage to secure the second mortgage bonds shall be a lien &c., next after and subject only to the first mortgage.

Section 36 empowers the company to redeem all outstanding bonds of the Port Dover Railway and the Stratford Railway.

Section 44 authorizes the company to enter into agreements with any other company for the building, leasing, equipment, or maintenance of the railway, or any part thereof, for any period, and upon any terms they may think proper.

On the 22nd April, 1881, pursuant to the powers conferred by the Act, an agreement was entered into between the Lake Erie Company (G. T. G. B. & L. E. Co.) and the Grand Trunk Railway Company, by which the former transferred or leased to the latter their line of railway, its works and appliances of all kinds, for the term of twenty-one years.

The Grand Trunk Railway Company agree to work, &c., repair, renew, &c., the railroad of the Lake Erie Company, provide rolling stock, &c., and do everything necessary to work it efficiently, and also to pay 25 per cent. of the gross receipts from all sources on the line of the Lake Erie Company computed, after certain usual deductions, to be applied towards payment of the interest on the bonds authorized to be issued under the Act and agreement. Until the issue of the bonds this payment was to be made to such person as the Lake Erie Company should designate; and after the issue into the bank, or other place where the bonds should be made payable.

As soon as 25 per cent. of the gross receipts exceeds

\$187.50 per mile, per annum, the surplus of the 25 per cent. over the \$187.50 is to be divided into two equal parts, one to be retained by the Grand Trunk Railway Company; the other to be paid over by them in the manner already mentioned.

This surplus, if any, is to be ascertained at the end of each year in rendering the accounts for the last half of the year.

The agreement then provides that the Lake Erie Company shall create a first mortgage on the whole of their line to secure an issue of first mortgage bonds \$727,500, bearing interest at five per cent., of which \$227,500 are to be allotted in respect of the Port Dover Company, and a second mortgage to secure an issue of second mortgage bonds to the extent of \$782,500, of which \$180,000 are to be allotted in respect of the Port Dover Railway.

The proportions so allotted are for the purpose of getting in and extinguishing the outstanding bonds of that company. The second mortgage bondholders are entitled to interest when and to the extent the percentage of gross receipts payable to the Lake Erie Company, after payment of the interest on the first mortgage bonds, \$36,375, enables the Grand Trunk Railway Company to pay it.

The agreement further provides for the keeping accurate accounts by the Grand Trunk Railway Company of the receipts of the line from all sources, to be made out to the end of each half year, and that the schedule agreed on for the rate of division of freights charged on traffic &c., may be readjusted at the instance of either party every five years during the continuance of the agreement.

On the 30th July and 2nd August, 1881, mortgages contemplated by the agreement and authorized by the Act were executed by the Lake Erie Company to trustees on behalf of the bondholders. They recite fully the agreement of the 22nd April and the provisions thereby made for payment of the interest.

It was admitted that bonds had been issued to the full extent authorized by the Act, and that notice of the issue had been given to the Grand Trunk Railway Company.

It was also admitted that the sums paid since making the leases of the 10th April, 1880, and the 22nd April, 1881, had not been sufficient to pay the interest on the bonds.

The effect of the Act of 1881, and of the instruments executed in pursuance of it, is to postpone the plaintiff's claim to the whole or the bonded debt of the Lake Erie Company, \$1,510,000, created under the Act, and not merely to the original debt of the Port Dover Road, (which always had priority to it), or to that portion of the bond issue of the Lake Erie Company allotted in respect of it. The 4th section, while professing to preserve the liability of the assets, present and future, of each of the amalgamated companies to any lien or claim existing against it, nevertheless expressly enacts that all such liens and claims shall be subject to the provisions of the Act relating to issue of bonds by the Lake Erie Company; and the 36th section then gives priority to the first and second mortgages over all other charges on all the property, present and future, of the company.

The plaintiff's position then would seem to be this: his judgment debtors have become amalgamated with other corporations, and no longer exist. The line of road of the new company, with all its rights, powers, and franchises, has been transferred for a term of years to the Grand Trunk Railway Company, which is now in possession of, and operating them; and although the principal of the bonded debt does not become due until the years 1901 and 1902, the whole of the Lake Erie Company's share of the gross receipts of the road, namely, 25 per cent. up to a certain sum, and as to the surplus over that sum, one half of such surplus, is charged in the meantime in the hands of the Grand Trunk Railway Company (who are by law bound to pay it over to the bondholders) with payment of the interest on the bonds, amounting on the first mortgage bonds alone to the annual sum of \$36,375; and unless and until the Lake Erie Company's interest in the 25 per cent. of the gross receipts is more than sufficient to meet the interest on all the bonds, there is no fund applicable for payment of the judgment.

When that state of things arises, and it has not yet arisen, and its existence seemed to be regarded as a very improbable contingency, it may be that the Port Dover Company's share of the surplus of the 25 per cent., ascertainable in the manner provided by the fourth section of the Act, will be assets in the hands of the Lake Erie Company, available for payment of the other liens and claims mentioned in that section, which may be reached by proceedings for attachment, or by an order upon the defendants to pay it into Court, as suggested by the Court in the case of *Simpson v. The Prescott and Ottawa R. W. Co.*, 1 Ch. Chamb. R. 126, 10 U. C. L. J. O. S. 108.

In these circumstances, and upon the principles deducible from the authorities I have referred to, I am of opinion, agreeing with my brother Ferguson, that the plaintiff is not entitled to a receiver.

1. Because it is neither just nor convenient that one should be appointed to receive the income of the road, merely to do with it just what the Grand Trunk Company are bound to do, and are doing with it.

2. Because there is no reason to suppose that there is anything to receive, in which the plaintiff can be interested. It was hardly attempted to be denied, that the only way in which the plaintiff expected the appointment of a receiver to be useful to him, was that the defendants would possibly pay his claim rather than submit to interference with their arrangements.

3. Because the utmost that can be said for making the appointment is that it will do no harm.

4. Because, though the bondholders are not in actual possession, the whole income of the principal defendants is legally applicable and is being applied towards reducing the incumbrances, and is insufficient to pay the interest thereon ; and

5. Because the judgment debtors are not the owners of or in possession of the road, which has become the property of another company, and is in possession of their lessees.

I think the appeal should be dismissed.

[That the motion may be renewed or made in the original suit, see *Salt v. Cooper*, 16 Ch. D. 545; *Smith v. Cowell*, 6 Q. B. D. 75; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275.]

HAGARTY, C. J. O., BURTON, and PATTERSON, JJ.A., concurred.

Appeal dismissed, with costs.

DONOVAN V. HERBERT.

Ejectment—Insolvent Act, 1878. secs. 68, 75—Assignee—Fraudulent conveyance—Pursuing creditors—Validity of sale—Title by possession.

In an action of ejectment the plaintiff claimed title under F., a grantee of S., the assignee in insolvency of P. D., who formerly owned the land, and who some years before his insolvency had conveyed the land to his brother, L. D. S., under the advice of the inspectors of the estate, refused to take proceedings to set aside the conveyance to L. D., as fraudulent, and two of the creditors, under the provisions of sec. 68 of the Act, having obtained leave from the insolvency Judge, instituted a suit in the name of S. and procured a decree declaring the conveyance to L. D. fraudulent and, as against S., void. The decree did not direct a sale of the land, as was prayed. The land was, however, advertised for sale, the period of advertisement being shortened by the Judge, and was sold to F. S. under instructions from the general body of creditors, at first refused to convey to F., but subsequently conveyed upon an order being obtained from the Judge directing him to do so.

Held, [affirming the decision of the Common Pleas Division, 9. O. R. 89] that the sale was not one subject to the control of the general body of creditors, and therefore that the restrictions of sec. 75 of the Act were inapplicable, and the sale was valid.

Held, also, that the defendant failed to establish his claim of title by possession.

THIS was an appeal by the defendant from the judgment of the Common Pleas Divisional Court in favor of the plaintiff.

The action was for the recovery of land.

The plaintiff formerly brought an action of trespass against the defendant in respect of the same land, and at the trial before Osler, J., without a jury, a verdict was entered for the defendant.

The plaintiff, with the view of obtaining a verdict and judgment in his favor, before the entry of judgment in the trespass action, in order to prevent it operating as an estoppel, brought the present action.

The plaintiff claimed title through a succession of conveyances, commencing with that from one McMahon, the owner in fee in possession in 1853.

The defendant alleged himself to be the owner in fee in possession of the land ; he also claimed the benefit of the Statute of Limitations, and pleaded the judgment in the trespass action in estoppel of the plaintiff's right to again question his title.

Before the trial of this action the Common Pleas Divisional Court set aside the finding of Osler, J., in the trespass action, and ordered judgment to be entered for the plaintiff (4 O. R. 635.)

The trial of the present action took place before Galt, J., without a jury, at the Toronto Summer Assizes, 1884.

The facts proved were shortly these :

Edward McMahon was owner of and resided upon the land in question, being a portion of what was known as the McMahon block, on Seaton street, in the city of Toronto.

On the 27th September, 1853, he sold at public auction the whole of said block ; and lots 17 and 18, portions thereof on the east side of Seaton street, were purchased by one Patrick Doyle ; and the adjoining lot 16 was at the same time purchased by the defendant.

Shortly after his purchase the defendant enclosed his lot and erected a dwelling on the rear thereof, where he took up his abode and subsequently resided.

The defendant was a builder, and about September, 1855, began to make use of portions of Doyle's lots by depositing thereon some trestles, lumber, and other appliances of his trade ; these he from time to time removed, and afterwards deposited other material, according as it served his convenience.

Doyle was aware that the defendant was making such

use of his lots, and one day remarked to him "that he might use them as long as he (Doyle) was not making any use of them;" and the defendant continued his use of the lots whenever he required to do so.

On the 27th August, 1859, Doyle made a conveyance of the lots to his brother, Lawrence Doyle, who was also aware of the defendant's user of the land, and consented thereto as Patrick had previously done; but about the year 1865 Lawrence Doyle entered upon the land, and removed a quantity of soil therefrom, with a view to level it. Afterwards, in the spring of 1876, he again entered upon the land and had it ploughed, and planted, and fenced. This was the first time the lots were enclosed since the purchase by Patrick in 1853.

From the commencement of his ownership the lots were assessed to Lawrence Doyle, and he paid the taxes thereon.

On the 27th July, 1877, a writ of attachment in insolvency, at the suit of Nerlich & Co., issued from the County Court of the county of York, directed to Robert Hall Smith, an official assignee, requiring him to attach the estate and effects of Patrick Doyle. Smith afterwards became assignee in insolvency of Doyle's estate. Certain creditors of the insolvent, viz., Sadlier & Murphy, carrying on business in New York, having proved claims against his estate, and finding the assets deficient, requested the assignee, under the provisions of section 68 of the Insolvent Act of 1875, to institute a suit against Lawrence Doyle to have the conveyance of the land in question declared fraudulent against creditors: the assignee under the advice of the inspectors of the estate refused.

Sadlier & Murphy thereupon applied for and obtained from the Judge in insolvency an order authorizing them, upon giving indemnity to the assignee, to institute such suit in his name, but at their own expense and risk.

Accordingly, on the 11th January, 1878, a bill was filed in the Court of Chancery for Ontario in the name of the assignee against Lawrence Doyle for the recovery of said land.

The cause was heard in November, 1880, and a decree

pronounced declaring the conveyance to Lawrence Doyle fraudulent and void against the plaintiff, as the assignee in insolvency of Patrick Doyle.

The defendant was aware of the pendency of the suit, and became surety for the costs of an appeal therein by Lawrence Doyle.

Pending that suit, on the 17th May, 1879, the defendant entered into an agreement with Lawrence Doyle for the purchase of said land for the sum of \$2,400; and paid him \$300 on account thereof.

By virtue of the decree the title of Lawrence Doyle to the land became vested in the assignee for the exclusive benefit of Sadlier & Murphy, pursuant to sec. 68 of the Insolvent Act, and the land was sold at public auction for their benefit accordingly.

By an order of the Judge in insolvency, dated 17th December, 1880, made in the matter of said insolvency, the period of advertisement of the sale was shortened to one month.

Thomas W. Fisher was the purchaser at that sale for the sum of \$2,450; and by an order of the Judge in insolvency, dated the 6th May, 1881, the assignee was directed to convey the land to Fisher, which he did accordingly.

The plaintiff claimed title under Fisher.

In January, 1882, the defendant purchased a portion of the land in question at a tax sale, but this was afterwards duly redeemed.

The defendant proved that at various times he deposited building materials on small portions of the land, which he claimed to be sufficient to satisfy the requirements of the statute.

The learned Judge held that the defence, based on the Statute of Limitations, failed, as there was no evidence to support it: that the plaintiff's title was before the Court in the action of trespass, and it was there held to be good. Judgment was accordingly entered for the plaintiff.

In Easter term following the defendant moved the

Common Pleas Division to set aside that judgment, on the ground that the plaintiff failed to prove such title to the land as would enable him to maintain the action; and because the defendant shewed in himself at the trial both possession and title under the Statute of Limitations. By the judgment of the Divisional Court (9 O. R. 89) that motion was dismissed: [ROSE, J., dissenting.]

The defendant thereupon appealed to this Court, and the appeal came on for hearing on the 27th and 28th of May, 1885.*

Osler, Q. C., and Wallace Nesbitt for the appellant. The plaintiff proved no title in himself. The conveyance from the assignee to Fisher was invalid and passed no title. Smith was only the trustee of a power, which he failed to exercise in conformity with the requirements of the Insolvent Act. There was no meeting of creditors to authorize the sale; the inspectors of the insolvent's estate were not consulted as to the disposition of the land; the sale was therefore invalid, and the conveyance to Fisher did not pass the legal estate. The assignee is a trustee in the premises for the creditors of the insolvent, and also for the insolvent himself, of any surplus after satisfying the demands of the creditors, which proves that the assignee is entitled, as representative of the insolvent's estate, and if so, he can only act in conformity with the Insolvent Act, which declares his powers.

Then the legal estate is outstanding in the mortgagee, and it is not sufficient that the respondent is entitled to possession till default. The defendant proved title in himself by possession for over twenty years: *Jolly v. Handcock*, 7 Ex. 820; *Re Dickinson*, 51 L. J. Ch. 736; *Thompson v. Hall*, 31 U. C. R. 367; *Davis v. VanNorman*, 30 U. C. R. 437; O. J. A., sec. 17, sub-sec. 5; *Harris v. Mudie*, 7 A. R. 414.

Foster for the respondent. The appellant has abandoned the defence of the Statute of Limitations. and relies now

**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

upon the defective conveyance of the assignee in insolvency. But it is not open to the appellant, a complete stranger to the premises, to question an official conveyance between third parties. The instrument bears on the face of it the sanction and authorization of the Judge in insolvency, and it is to be presumed that before such sanction was obtained, care had been taken that the preliminaries leading up to it had been complied with. As a matter of fact, the statute was followed in every requisite particular. An order was obtained shortening the time of sale, and an order made directing the assignee to execute the conveyance to Fisher. The legal estate was, by virtue of the writ of attachment, vested in the assignee, and it passed from him to Fisher. Under any circumstances the legal estate would pass by the assignee's deed, whether the requirements of the statute were observed or not. Even a fraudulent conveyance passes the legal estate, though any trust attaching to the land would follow it into the possession of the grantee. There arises no question as to what disposition would be made of the surplus, because here there is none, the amount realized from the sale being insufficient to satisfy the claims of the particular creditors. If any meeting of creditors was necessary preliminary to the sale, the particular creditors by whom and for whose benefit the law was set in motion, were alone the persons entitled to act, and direct whatever was to be done. No other creditors of the insolvent had any interest in the matter, or were entitled to be consulted.

But the appellant is estopped from asserting title against the respondent: the defendant's possession, such as it was, was by leave of Lawrence Doyle. Assuming that the mere deposit occasionally, by Herbert, with the owner's permission, of a few poles, sometimes of a cord of wood and an odd load of sand, on a vacant, unenclosed lot, separated from his own premises by a fence, can, without violence, be called a possession. During the pendency of the suit in Chancery by the assignee against Doyle for the recovery of the land, the appellant enters into an agreement under

seal with Doyle for the purchase of it: by so doing he became affected in the same manner as Doyle and as if he had been a party to the suit, by the decree to be thereafter pronounced. He and Doyle, in fact, were involved in a common fate. Doyle's title having been declared void against creditors, all claim of the appellant was thereby also destroyed. He could not thereafter set up any claim of title against the assignee, so that the right and title of the appellant and Lawrence Doyle became vested in the assignee, under whom the plaintiff claims.

The Respondent in person.* The land in question was the property of Lawrence Doyle, at the time of Patrick's insolvency, and did not vest in the assignee by virtue of the writ of attachment. Nothing vested in the assignee under the insolvency but such estate as properly belonged to the insolvent. The land in question not only did not belong to the insolvent, but neither he nor his assignee could question or impeach Lawrence Doyle's title. But the assignee, the representative of the creditors, in whom their rights were merged, might exercise the option, which rightfully belonged to creditors prior to the insolvency, of having the conveyance to Lawrence declared void. The assignee refused to exercise this right, whereupon, under section 68 of the Insolvent Act, the right of every creditor, as it existed prior to the insolvency to impeach the conveyance to Lawrence, became restored—except that the proceeding must be taken in the name of the assignee.

The assignee's refusal placed the proceeding and the property outside the matters in insolvency, and made all further proceedings strictly personal between the pursuing creditors and the fraudulent grantee. If upon a sale the property yielded more than the creditors' claims, the surplus would belong to Lawrence Doyle; if less, the creditors would credit it on their claim and prove for the surplus against the insolvent's estate.

* Mr. Donovan was permitted by the Court to speak to the case, though he had also appeared by counsel, it being stated that such permission was not to be taken as a precedent.

Though the conveyance to Lawrence Doyle is called fraudulent, it is so only relatively as to creditors ; and as to them only to the extent necessary to satisfy their claims. It is a voidable conveyance, perfectly valid until set aside. All acts of Lawrence up to the date of the decree are valid acts of the lawful owner. Only Lawrence could have interrupted the defendant's possession—arguing that to be possession which all the Judges have pronounced not to be so, as he alone was seized of the legal estate. By Lawrence's entry and occupation of the land, and the exercise of acts of ownership in 1865 and 1876—had the defendant been in possession he would be dispossessed also by the defendant's agreement to purchase from Lawrence in May, 1879—he estopped himself from questioning his title. But did Lawrence's acts of interruption, assuming the defendant to have been in possession, enure to the benefit of the assignee ? Clearly they did so ; because it is from Lawrence Doyle the assignee derives the legal estate. The Insolvent Act, with the decree in *Smith v. Doyle*, operates as a conveyance to the assignee, who is thereby clothed with all Lawrence's estate and title. This being so, the defendant is equally precluded from questioning the assignee's title, as he would be that of Lawrence.

Again, the defendant having entered into the agreement with Lawrence to purchase, pending the assignee's suit against Lawrence for recovery of the land, he became bound equally with Lawrence by the decree pronounced therein. On this ground also the defendant is estopped from questioning the plaintiff's title derived from the assignee.

Had there been no insolvency, and a judgment creditor of Patrick's had filed a bill to set aside the conveyance to Lawrence, Patrick would not have been a necessary party to such suit ; *Scott v. Burnham*, 19 Gr. 234, and if a sale was ordered in such suit, and a conveyance to the purchaser became necessary, it is Lawrence who would convey, not Patrick ; *Reese River Silver Mining Co. v. Atwell*, L. R. 7 Eq. 347 ; *Bott v. Smith*, 21 Beav. 511. This con-

A suggestion was made during the argument as to the injustice of a creditor, suing in this way for a debt due to the insolvent, being allowed to retain such a debt for his own benefit. It is a sufficient answer to say that the section has no application to such debts, the assignee's duties in reference to them being regulated and defined in another section, which provides that after having acted with due diligence in the collection of them, if there remain any due, the attempt to collect which would be more onerous than beneficial to the estate, he may, with the consent of the creditors or the inspectors, sell the same by public auction, and the purchaser is entitled to enforce payment of the same in his own name.

The case referred to in the Quebec Courts was one in which the transaction was impeached as void against the creditors, and probably something turned upon the effect of the order which had been granted, and remained unreversed, as the transaction being good *inter partes*, and a perfectly valid payment apart from the provision of the insolvent law, it would seem upon principle that, after payment of the impeaching creditor's claim, the defendant would have been entitled to retain the balance of the money which had been paid to him by the insolvent. The operation of sec. 68 has no doubt been generally confined to proceedings taken to impeach transactions alleged to be void under the insolvent law, although cases may be suggested in which other proceedings might be taken and in which a question might arise as to the distribution of the proceeds.

The section itself, like a great many other sections of the Act, is framed in the vaguest and most general terms. We should have expected to find some declaration that the moneys when received, should, after deducting the expenses, be applied in satisfaction of the creditor's claim, and some direction as to the surplus—all this is however left for judicial construction. It might in such a case as we are considering, upon the state of facts I have suggested, be important with a view to ascertain how far sec. 75 applied,

but we are not troubled with any such question here, for the reasons I have pointed out, the only person possibly interested in a surplus being the fraudulent grantee.

I am of opinion therefore that the sale by the assignee, and the conveyance to Fisher, under whom the plaintiff claims, were valid, and that the plaintiff is entitled to recover unless his title is extinguished by the Statute of Limitations.

I do not think it necessary to consider the question argued at the bar as to the time when it was claimed that the statute first commenced to run—and the interruption of its running by the Acts relied on, because I fully agree with Cameron, C. J., that the mere user of a vacant lot of land, in the manner in which the defendant is shewn to have used this lot, never could ripen into a title under the Statute of Limitations—even if it had been shewn, as it has not been, that such user was continuous. No case was cited for the position that such acts, which, unless a license be shewn, would be nothing more or less than several and distinct acts of trespass, are to be regarded in the same light as an actual enclosure, or an actual occupancy, or *possessio pedis*, which being definite, positive, and notorious would put an actual owner on his guard. Is the piling of some lumber on ten feet to be construed into possession of the whole lot, and if not, what evidence is there here to shew that any portion of the lot has been used and occupied continuously for twenty years in the way suggested? I think there is no evidence to sustain the defence. The technical objection of the outstanding mortgage fails for want of proof.

I am of opinion that the judgment below is right and should be affirmed, and the appeal dismissed, with costs.

PATTERSON, J. A.—The defendant never had any right to the land in question, beyond permission, either tacit or express, to place upon it his trestles or other things which he had for use in his trade of builder, when he was not employing them elsewhere. He sets up a title under the

Statute of Limitations, but it is clear, as has been pointed out in the Court below, that he cannot maintain that claim. He is, therefore, occupying without right or title, and is driven to rely upon any defects he may be able to find in the title of the plaintiff.

Our inquiry thus comes to be limited to the plaintiff's title. Has he shewn a title sufficient as against this defendant, who is a mere wrong doer ?

Patrick Doyle owned the lot, and made a conveyance of it to his brother Lawrence Doyle. As between the brothers, the lot then belonged to Lawrence ; but the conveyance was declared by the Court of Chancery to be fraudulent and void as against Patrick's creditors, and the plaintiff makes title under a conveyance from Mr. Smith, Patrick's assignee in insolvency, to one Fisher.

It is proved that two creditors of Patrick, acting under section 68 of the Insolvent Act of 1875, obtained an order of the Judge, authorising them to take proceedings in the name of the assignee to recover the land in question.

A point was made in argument before us on the omission to specifically name the land in the order, or in any of the proceedings that led up to it ; but it is described as being claimed by Lawrence Doyle, and it cannot reasonably be doubted that that was sufficient, as it in fact conveyed all the necessary information to the assignee and to the creditors and inspectors.

In pursuance of the order, the creditors instituted the suit of *Smith, Assignee, v. Lawrence Doyle*, and procured the decree that the conveyance was fraudulent and void as against Smith, as assignee in insolvency of Patrick Doyle.

There is nothing on the face of the record in that suit to distinguish it from an ordinary suit by an assignee in insolvency to impeach a deed of lands, under 13 Eliz., ch 5, on behalf of all the creditors of the insolvent. It is from evidence outside of those proceedings that we learn that the two creditors were prosecuting the suit under section 68.

The bill had asked for a sale of the land, but the decree stopped short of ordering a sale, for which there may have been reasons, possibly from the fact that the Court that pronounced the decree was not charged with the administration of the estate, and was not called upon to declare that the creditors required to resort to this property.

The assignee sold the land to Fisher, and the Judge of the County Court made an order dated 6th May, 1881, ordering the assignee to execute a proper conveyance pursuant to the statute in that behalf to Fisher, and the assignee accordingly executed the deed which the defendant now contends was inoperative to convey any right of possession to Fisher.

The objection is, that the requisites of section 75 of the Insolvent Act of 1875, as amended in 1877, by 40 Vict., ch. 20, (D) were not observed.

The power to sell is given by that section in direct terms. Its words are "The assignee may sell the real estate of the insolvent." That is, however, accompanied with certain restrictions. Those affecting this province are as follows: "But in any Province, other than Quebec, no sale shall be completed unless (a) the proposed sale has been sanctioned by the creditors at their first meeting, or at any subsequent meeting called for the purpose, or by the inspectors; or (b) the assignee has advertised an auction sale or sale by tender, in accordance with the directions in that behalf given by the creditors at their first meeting, or at any subsequent meeting called for the purpose, or by the inspectors, and the inspectors sanction in writing the acceptance of a price not greater than the amount bid or tendered."

Now, whatever may be the exact force of these last words, it is obvious that the restrictions aim at securing obedience to the wishes of the creditors in the mode of selling the real estate. They provide for two cases, viz., when the sale is before the meeting of creditors, and when it is not till after the meeting. In the one case the creditors are to sanction the sale which has been made; in the

other they are to direct how it is to be made. The action of the inspectors is merely alternative.

But when the creditors, as in this case, finding land held by a stranger, under a deed executed by the insolvent before his insolvency, and therefore *prima facie* not an asset of the estate, refuse to authorise the proceedings necessary to bring it in as an asset, leaving an individual creditor to proceed under section 68, at his own expense and for his own exclusive benefit, it is clear that the restrictions of section 75 are inapplicable.

The action to be taken by the creditors under that section would be inconsistent with their refusal to authorise the assignee to take proceedings to impeach the conveyance for the benefit and at the expense of the estate. There is nothing on which the restriction can operate.

This view plainly distinguishes the present case from *Jarvis v. Cook*, 29 Gr. 303, although, for other reasons pointed out in the argument, that decision is rather beside the matter now in contest.

I do not think we are at all interested in the inquiry, which formed the subject of a good deal of discussion both in the Court below and before us, as to what would become of the surplus of such an asset as the land now in question over and above the debt of the creditor by whose enterprise it was realized.

Mr. Donovan, the plaintiff, in his argument before us made a suggestion as to the principle of sect. 68 which struck me as being probably not far astray, while it gave a reason for our not troubling ourselves with speculations beyond what the point immediately before us may call for. His argument, as I apprehend it, was that the creditor being prevented, by reason of the assignment in insolvency, from prosecuting his debt to the extent of enforcing execution against such an asset as land held under a fraudulent deed, was by the effect of section 68 restored as nearly as circumstances permitted to his former rights, in case the creditors generally would not proceed for the common benefit. The accident of the vesting of the title in the assignee compelled

the use of the name and a resort to some of the machinery of the Insolvent Act, but the object aimed at and the right given to him was to secure the result which, if the insolvency had not obstructed him, he might have achieved under his judgment and execution.

Section 75, as amended, made an advertisement essential only in the Province of Quebec, and the restrictions applicable in other provinces being excluded, if I am right in holding that they are excluded in cases coming under section 68, there are really no essentials prescribed, the absence of which can afford a ground for a stranger, such as this defendant, contending that the conveyance from the assignee did not carry the title, though for the purpose of this action it is enough if the right of possession passed.

I am of opinion that the judgment is correct, and that we should dismiss the appeal with costs.

OSLER, J. A.—The benefit to be derived under sec. 68 by the pursuing creditor from a proceeding, which the assignee refuses to take for the benefit of the creditors generally, is the payment of his own debt in whole or in part. It is not intended that he shall make a profit out of it, and recover to his own use the whole subject of the suit, if it is more than sufficient to pay his debt, any more than the general body of creditors are entitled to be paid more than 100c. on the dollar out of the general assets. The object of the Act being the administration of the assets, and the payment of the debts of the insolvent, it appears to me extremely clear that when the 68th sec. (which has nothing penal or punitive in its character) provides that the benefit derived from the proceeding which the assignee refuses to take, shall belong exclusively to the creditor or creditors who are willing to incur the risk and expense of doing so, it is merely contrasting such a proceeding with one which is taken for the benefit of the creditors generally. It is a proceeding which, though carried on in the name of the assignee, as the person in whom the estate of the insolvent is vested, is really taken and controlled by an individual creditor or class of creditors.

Whether in the case of a mere debt the assignee's right of recovery in such a proceeding is limited to the amount of the creditor's demand, as in cases of garnishment, or whether he recovers the whole, taking any surplus after payment of that demand for the benefit of the estate, need not now be determined.

But where, as in the case before us, the object of the suit is to set aside a fraudulent conveyance, the only beneficial plaintiff in the suit is the pursuing creditor, and the conveyance is avoided only so far as may be necessary to satisfy his demand. Subject to that, the estate belongs not to the insolvent, but to the person to whom he conveyed it or his assigns, and the other creditors, having refused to sanction the proceeding, have no interest in that particular suit, which might at any stage be dismissed or stayed upon payment of the claim of the creditor or creditors who instituted it. And if the land should be sold in the suit, or sold by the assignee, any balance in the hands of the latter after payment of such claims, would belong, as I think, not to the insolvent or his estate, but to the defendant, the proceeding not having been taken for the benefit of creditors generally, but for one or for a limited class. From this it seems to me to follow that as in such a suit the assignee is not acting for the creditors generally, or administering the estate of the insolvent, but is subject to the control of the creditors who institute it, and whose suit in fact it is, the requirements of the Act as to the sale by him of the real estate of the insolvent are inapplicable to the sale of real estate or an interest therein, reached or recovered by means of such a suit.

The sale therefore being one not subject to the control of the general creditors, I agree with the majority of the Court below in thinking that their sanction of it was unnecessary under the 75th sec. The legal estate passed by the deed from the assignee to Fisher, and the only person who has any right to question the manner in which that transaction was carried out is Lawrence Doyle, or his representative.

As regards the defence set up under the Statute of Limitations, the evidence satisfies me after an attentive consideration of it that the possession of the defendant was not of the continuous and exclusive character necessary to maintain it.

I agree that the appeal should be dismissed.

HAGARTY, C. J. O., concurred.

Appeal dismissed, with costs.

McKENZIE ET AL. V. DANCEY ET AL.

Agreement—Vessel—Cargo—Readiness and willingness to receive—Question of fact—Documents—Evidence—Appeal—Jurisdiction—R. S. O. ch. 42, secs. 16, 22.

The plaintiffs alleged and proved an agreement with the defendants that the defendants' vessel should proceed to B. and carry thence to C., a cargo of lumber; that the vessel did not go to B. as agreed; and that in consequence the plaintiffs had to procure another vessel and pay a larger price than that agreed upon with the defendants.

The defendants alleged that the reason they did not go for the lumber was, because the plaintiffs did not give them or send to the master of the vessel the necessary orders. The Judge who tried the action in the County Court of Lambton, found this allegation untrue, and gave judgment for the plaintiffs.

Held, that this Court could not reverse the finding in the Court below upon this question, as the view of the facts presented by the appellants, derived no support from the documents in evidence, and the Court did not see its way to taking a different view of the evidence from that taken by the Judge at the trial.

Held, also, that it was sufficiently proved that the plaintiffs were ready and willing to ship the lumber: but

Per BURTON, J. A., [dissenting].—The plaintiffs should have averred, and the onus was upon them to shew, and they did not shew their readiness and willingness to ship the lumber on the defendants' vessel. The case however was disposed of in the Court below on an immaterial issue; and as the appellants chose to rest their case upon a point which the Judge found against them, the appeal should be dismissed.

An objection to the jurisdiction exercised under R. S. O. ch. 42, secs. 16, 22, was not entertained, because there was nothing upon the proceedings to shew that the case was not tried before the proper Judge.

THIS was an action in the County Court of Lambton, by charterers against shipowners for not proceeding to the

port of loading, and loading and delivering a cargo of lumber, as agreed.

In their statement of defence the defendants alleged that they were ready and willing to perform their contract, and offered to do so, but that the plaintiffs refused to give the defendants, or their agent, the necessary orders to enable him to obtain the cargo, whereby they were prevented from carrying it as they otherwise would have done.

The learned Judge in the County Court found the defence not proved, and gave judgment for the plaintiffs, against which the defendants appealed.

The appeal was heard on the 8th of May, 1885.

Aylesworth, for the appellants.

Wallace Nesbitt, for the respondents.

Irving, Q. C., for the Attorney-General of Ontario, who appeared pursuant to notice given under 46 Vict. ch. 6, sec. 6, (O.,)

May 26, 1885. BURTON, J.A.—This is an action by the freighters against the shipowners, upon a contract, not in writing, in the nature of a charter party, for not proceeding to Byng Inlet in the Georgian Bay, and there take on board a cargo of lumber.

In such an action, in the old days of pleading, it would have been necessary for the plaintiff suing for non-performance to have averred and proved an offer, at least at the same time, to perform his part of the contract, or a readiness and willingness of which the other had notice.

A declaration omitting such an averment would have been bad on demurrer, or even in arrest of judgment.

It is true that, under the former system of pleading, allegations, though necessary to be made by the plaintiff, would be taken as admitted unless traversed; but all that is now changed, and the silence of a pleading as to any allegation contained in a previous pleading of the opposite party is not to be construed into an implied admission of the truth of such allegation.

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But, notwithstanding these changes in pleading, the Judicature Act has not altered the law governing contracts ; where a party is suing for the breach of a contract, and the matters to be done on each side are concurrent acts, a readiness to perform his own side of the contract is a condition precedent to the right of either of the contracting parties to sue ; and it is as necessary now as it ever was for the plaintiff, suing the other for non-performance, to shew affirmatively his readiness to perform his part of the contract, unless he can establish an absolute and unconditional refusal under any circumstances to carry out the contract.

In this case it was necessary for the plaintiffs to shew their readiness and willingness to ship, in the same way as it would have been necessary for the shipowners, before they could recover, to prove that their vessel was at the port ready to receive the cargo.

That allegation must be held to be impliedly contained in the statement of claim, and is directly in issue, and the onus of proof is upon the plaintiffs.

The case has been tried upon an immaterial issue, viz., whether in point of fact there was any agreement for an order. That, to my mind, is quite beside the question, which is, was there any evidence to shew affirmatively that the plaintiffs were ready to ship the lumber ?

The learned Judge refers to the fact that an order was sent on the 2nd October, but this order was not sent to the persons in charge at Byng Inlet, but to the mill at Waubashene, some 100 miles distant. The learned Judge finds that this was not communicated to the captain, and there is no evidence of the order ever having been acted upon, or sent forward to Byng Inlet.

It is said that the vessel sent subsequently received the cargo without difficulty ; but if, as the plaintiffs admit, it would have been an unbusiness-like transaction to go without an order, the reasonable inference is, that the captain of that vessel had an order ; and it would be contrary, I think, to principle to hold that that fact alone satisfied the onus that was upon the plaintiffs.

In my opinion, the case has been disposed of in the Court below on a false and immaterial issue; but it is not very apparent that the point I am now referring to was urged in the Court below, and that being so, and the parties having chosen to rest their case upon a point which the Judge has found against the defendants, I am prepared to concur in dismissing the appeal.

Upon the objection as to the jurisdiction, there is nothing upon the proceedings to shew that the case was not tried before the proper Judge.

PATTERSON, J.A.—I am of opinion that we should dismiss the appeal for the reasons given by my learned brother Osler in his judgment, which I have had an opportunity of seeing.

Whatever want of distinctness there may be in some of the evidence, I think our duty in this Court is very plain.

The plaintiffs in their statement of claim allege, in effect, an agreement with the defendants that the defendants vessel should proceed to Byng Inlet, and carry from that place to Courtwright a cargo of lumber: that the vessel did not go for the lumber; and that in consequence the plaintiffs had to procure another vessel to carry it, and pay a larger price than what they were to pay the defendants.

The defendants formally deny all these allegations, and the plaintiffs prove them all.

The defendants, however, allege that the reason why they did not go for the lumber was, because the plaintiffs did not give them or send to the master of the vessel the necessary orders, and the learned Judge who tried the action found that that allegation was untrue.

I see no reason for disapproving of that finding.

I think the argument that was founded upon the evidence, as reported to us, rested upon an understanding of the facts which derives no support from the correspondence by letter and telegraph which is in evidence; and we could not give effect to it without differing in our appreciation of the evidence from the Judge before whom it was given.

I do not intend to notice the evidence in detail, which would be merely to do what my brother Osler has done. I shall only refer to two things which were the subject of a good deal of the discussion.

One is the captain's statement, that he did not receive at Sarnia, or anywhere else, an order, which he says was to have been addressed to him there.

It is not found as a fact that he did not receive it; and if it were important to find the fact, I could not overlook some rather strong considerations which tell the other way.

The plaintiffs' book-keeper deposes that he mailed the order to the captain at Sarnia, and that it was not returned from the post office; the captain does not appear at any time during the month from 25th or 26th September, when he was at Sarnia, till 27th October, when he telegraphed his owners that the plaintiffs had got another vessel, to have either asked the plaintiffs for an order or informed them that he had not received it. His telegraph to them of 22nd October, saying that he had been delayed longer than he expected, contains no hint that he had been delayed by want of the order.

The other matter I refer to is this telegraph of 22nd October. In it the captain says he will carry the lumber as agreed, and adds, "Is order there?" This is relied on as a demand for the order which nearly a month earlier he was to have had at Sarnia. I do not so understand the evidence; or at least it is not so clearly as contended, that we should be asked to overrule the learned Judge's view of it.

The plaintiff, Peter McKenzie, explained in his evidence that there were or might be two orders, one as a voucher to the captain for his right to receive the cargo; the other for instructions to the mill as to the descriptions of lumber to ship.

The captain's own evidence agrees with this. He said: "I asked Peter McKenzie for an order which we always

got, which would be to the mill people to shew I was chartered." That I understand was the kind of order he expected at Sarnia.

The other with specifications was sent to the chief officer of the Georgian Bay Lumber Company at Waubashene, and the mill at Byng Inlet belonged to that company.

This last order would seem to be what is asked about in the telegram of 22nd October, and one can easily understand how the captain might call attention to it, even if he had the other already in his possession.

OSLER, J. A.—Upon a careful consideration of the evidence, I am clearly of opinion that the judgment is right, and that the appeal should be dismissed.

It was proved that on the 25th September, 1883, an agreement was made with the plaintiffs by Macpherson, the captain of the defendants' vessel, the "Jane McLeod," to go to Byng Inlet, and bring thence a cargo of lumber, and deliver it for the freight agreed upon at Courtwright on the River St. Clair.

The lumber was part of a larger quantity, which had been manufactured for the plaintiffs by the Georgian Bay Lumber Company, one of whose saw mills was at Byng Inlet.

Macpherson asked for an order to the mill people to shew that he was chartered, having on a former occasion been told by the manager at the Inlet not to go there again without an order, and the plaintiff Alexander McKenzie promised to send it to him at Sarnia, where his vessel was to be on the following day. McKenzie said he mailed the order to the captain's address at Sarnia on the same day, but according to the captain's evidence it had not arrived there when the vessel left that place on the afternoon of the 26th September for her next port.

On the 2nd October the plaintiffs sent to the company at Waubashene on the Georgian Bay, the place where the chief business connected with their saw mills was transacted, an order in the following terms.

Courtwright, Oct. 2nd, 1883.

Georgian Bay Lumber Co'y

Waubashene.

Send per McLeod hundred thousand mill culls, forty thousand eighteen feet c., thirty thousand plank, hundred thousand lath. Balance C stocks.
McKenzie Bros.

On the 3rd October they received from the captain, who was then at Owen Sound, a telegram, that if they could get another vessel he would like it as he was " offered a big thing to go to Prince Arthur's Landing." To this they replied on the following day.

" Regret not being in a position to get another vessel. P. A. still sick—depend on you.

" McKenzie Brothers."

No further communication passed between the parties till the 22nd October, when Macpherson telegraphed the plaintiffs from Collingwood,

Collingwood, Oct. 22nd, 1883.

McKenzie Bros.,

Courtwright.

Will leave for Inlet Wednesday to load for you. I have been delayed longer than expected, but will carry your lumber as agreed. Is order there? Answer.

Capt. F. McPherson.

There was no one at the plaintiffs' place of business who was in a position to send an answer to this message, nor was any answer sent, or further requested.

The next day one of the plaintiffs, who was then at Waubashene, telegraphed to the defendant Dancey :

Waubashene, Oct. 23, 1883.

T. N. Dancey,

Goderich.

" Jane McLeod " chartered nearly two months ago to take lumber Byng Inlet for us. Do you mean to carry it?

The defendant on the same day replied :

Goderich, Oct. 23rd, 1883.

McKenzie Brothers,

Waubashene.

" McLeod " leaving Collingwood for Byng Inlet for your lumber.

T. N. Dancey.

He said he did so because he had seen Macpherson at Kincardine, who had told him he was going there for it

He had not said anything to his owners about the absence of an order.

Macpherson swore that on the 26th October, or thereabout, he finally relinquished the intention of going to the Inlet, and that his reason for doing so was, that he had nothing to shew that he was sent for the lumber. On the same day he telegraphed his owners, that the plaintiffs had got another vessel, and that he had chartered for another voyage at a higher freight. So far as appears, he had no ground whatever for saying that the plaintiffs had got another vessel; and upon his message being communicated to them by the owners, they replied that he had been misinformed, and that they would charter another vessel and charge Mr. McLeod with the difference. They subsequently did so, and the damages awarded in the action consist of the difference they were compelled to pay for freight and insurance.

In the reasons of appeal it is contended that the giving to the defendants' captain of an order for the lumber to be carried, before he sailed to Byng Inlet, was a condition precedent to the performance of the contract.

That, however, is not the defence set up in the statement of defence, which is only that the plaintiffs refused to give the defendants, or their agent, the necessary orders for the lumber to enable him to procure the cargo, whereby the defendants were prevented from obtaining and carrying it. No doubt, if the plaintiffs were not ready and willing to furnish the cargo, that would be a defence to the action; but to an absolute contract to proceed to a port, and there load a cargo, it is no answer that the order therefor was not given to the captain of the vessel. It was the latter's duty to go for the cargo, and *non constat* the plaintiffs were not always ready and willing to furnish it, as of course it was necessary for them to aver and prove.

I think, however, that it was agreed between the captain and the plaintiffs that the former should have, as he says, "something to shew the mill people that he was chartered." This might, or might not be the order for the particular

kind and description of timber the plaintiffs wanted out of their stock. The contract was for a cargo of lumber generally. The plaintiffs were at liberty to make it up as they pleased, and might send the order for it either by the captain, or direct to the lumber company, but as regards the captain's authority to receive a cargo, which was the only thing stipulated for, I am of opinion that he had all that was necessary in the plaintiffs' telegram of the 4th October, already referred to, which informed him that they could not get another vessel, and depended on him. If he was not satisfied with this, he should have explained to them that he had not received the order sent to him at Sarnia, which, looking at the subsequent correspondence, the plaintiffs might well assume had reached its destination.

In the 5th reason of appeal it is contended that an order was necessary to enable the defendants to obtain the lumber at Byng Inlet, which order was to have been supplied by the plaintiffs,—if not to the defendants at least to the mill—and that no order was ever supplied either to the defendants or to the mill at Byng Inlet.

The order sent to Waubashene, it is said, was not sufficient, as Waubashene and Byng Inlet are different ports.

This is a defence of quite a different character—namely, that the plaintiffs were not ready and willing to furnish the cargo. But it was not put forward in this way at the trial, where the contention seems to have been that the captain was not bound to sail without the order I have already referred to. I think the evidence quite sufficient to warrant the inference, that if the captain had gone to Byng Inlet he would have received his cargo. The order was sent to Waubashene, the chief place of business of the company with whom the plaintiffs were dealing, and on the 23rd October the plaintiff, Peter McKenzie, telegraphed from that place to the defendants about the vessel. In the absence of anything to the contrary, it may well be assumed that the order was duly forwarded to the Inlet. If any question had been raised about it at the

trial Peter McKenzie, who was a witness, could probably have explained it, and it is too late now to permit the defendants to suggest a doubt.

An argument was addressed to us upon another point not raised at the trial, namely, the constitutional validity of the Local Courts Act, R. S. O. ch. 42, sects. 16-22; the objection being that the trial took place before a gentleman who was not the Judge of the County Court of the county of Lambton.

It is, however, unnecessary to determine, and, therefore, considering its character, is undesirable to express an opinion upon this objection, as the fact alleged is not proved. For anything we judicially know, or can see on the record and proceedings before us, the learned Judge by whom the action was tried was the duly commissioned Judge of that County Court. I refer to *The Queen v. Fee*, 3 O. R. 107.

There is nothing to complain of in the amount of damages. The plaintiffs did not know until the 27th October (if then) that the captain did not mean to go to Byng Inlet, and the evidence is that they procured another vessel as soon, and at as reasonable a rate as they could after that time.

I think the appeal should be dismissed.

HAGARTY, C. J. O., concurred with PATTERSON and OSLER, JJ.A.

Appeal dismissed, with costs.

WARIN ET AL. v. THE LONDON AND CANADIAN LOAN AND
AGENCY COMPANY ET AL.

Water lots—Crown grant—Interference with navigation—Easement.

Held, [affirming the judgment of the Queen's Bench Division, 7 O. R. 706] that the plaintiffs claiming under a grant from the Crown to the City of Toronto, which gave a right to the city and its lessees to occupy and use for the purpose of stores and buildings, certain lots covered with water, which grant was confirmed by legislation, had the right to build as they chose upon the lots, subject to any regulations which the city had the power to impose upon the lots, and in doing so to interfere with the rights of the public to navigate the waters.

The finding of the jury negating an easement contended for by the defendants, was also affirmed by this Court.

AN appeal by the defendants from the judgment of the Queen's Bench Divisional Court (7 O. R. 706), discharging an order *nisi* to set aside the judgment for the plaintiffs at the trial and to enter judgment for the defendants, or for a new trial.

The action was for trespass to a water lot over which the defendants claimed a right of way.

The facts are fully stated in the report of the case in the Court below.

The appeal was heard on the 15th and 18th days of May, 1885.*

Arnoldi and *Howland* for the appellants.

Robinson, Q. C., and *T. P. Galt*, for the respondents, were not called on.

May 26th, 1885. BURTON, J. A.—I agree with the rest of the Court that no ground has been shewn on the argument for interfering with the judgment of the Court below, and that it is unnecessary to call upon the counsel for the respondents.

I think the evidence fully warrants the contention of the counsel who has last addressed us, and the findings of the Court below, that the waters covering the plaintiffs'

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lot are shewn to have been at the time of the granting of the plaintiffs' lease navigable waters, over which the public were at liberty, without license and without being liable as trespassers, to pass; but this is, in my view, destructive of his leader's contention as to the supposed easement.

The learned counsel, I thought, rather unnecessarily labored the point that the Crown could not by a grant of land, covered with water, confer upon the grantees any authority to interfere with the public right to navigate the waters, if navigable for vessels, a point which I am quite sure will not be questioned for a moment by the learned counsel on the other side.

The sole question is, whether, by the combined effect of the Crown grant and the subsequent legislation, full power has not been given to grant, not only the land, but the right to interfere with the navigation.

The original grant from the Crown to the City of Toronto, under whom both parties claim, made it obligatory upon the city, within three years after occupation, to fill up to the height of three feet above high-water level all the lots so occupied to the southern limit of the proposed esplanade, but it gave a right to the city and its lessees to occupy and use for the purpose of stores and buildings the lots so covered with water as far south as the windmill line.

This patent is recited in the 16 Vict. ch. 219, and again referred to in the 20 Vict. ch. 80, which gives power to the city to convey, and directs them to convey the water lots to the south of the Esplanade to the parties whose lands were compulsorily taken for the purpose of the Esplanade—a very barren grant, if the defendants' contention be well founded.

I should have supposed this a sufficient recognition by the Legislature of the patent to give it full effect; but all doubt upon the subject was effectually set at rest by the 23 Vict. ch. 2, sec. 35, which recognizes the right of the Crown to make such grants, and confirms all grants pre-

viously made. The addition to be found in the Revised Statutes was introduced for the purpose of shewing that as to future grants the Legislature assumes to deal only with such as are within the jurisdiction of the local Government and Legislature—the right to legislate in reference to navigation being beyond their control.

I think it clear, therefore, that the plaintiffs had a right to build as they chose, subject only to any regulations which the city had the power to impose upon the water lots, and in doing so to interfere with the rights of the public to navigate the water, and that the defendants fail to make out a defence, unless the contention as to the supposed easement can be sustained.

The first difficulty in their way is, that the jury have negatived the supposed easement, and they have failed to convince the Divisional Court that that finding was unwarranted.

A number of objections were made to the finding of the jury and to the learned Judge's charge.

But, assuming the right now claimed to have been established upon the clearest evidence, and upon a charge which was perfectly unexceptionable, I fail to see any evidence that the acts which are now complained of were done in the exercise of that right. The vessels were not crossing the plaintiffs' lot in the exercise of the right claimed, but were deliberately moored and fastened to the wharfs, and were incumbering the plaintiffs' lot. They were not there for the purpose of trade and commerce, but the defendants were taking the law into their own hands, and adopted this rather high-handed and arbitrary mode of doing so. This is the view taken of it by the jury, and they have, I think not unreasonably, marked their sense of such a mode of proceeding by giving substantial damages.

I can see no reasonable ground for our interfering as an appellate Court with the decision of the Court below, and am of opinion that the appeal should be dismissed, with costs.

PATTERSON, J. A.—The patent of 21st February, 1840, granted to the City of Toronto, upon the trusts and subject to the provisos therein expressed and contained, “all those parcels and tracts of land covered with water, and situate in front of the City of Toronto, in the County of York, in the Home District, in our said Province of Upper Canada; and also, all those parcels or strips of land situate between the top of the bank and the water’s edge of the Bay, situate in the said City of Toronto, adjoining to the said water lots, and which said land covered with water or water lots, and the strips of land situate between the top of the bank and the water’s edge of the Bay, are known and described as follows, that is to say:—”

Describing various water lots extending to the windmill line, and amongst others a tract which included the water lot in front of town lot No. 8, which is the water lot, over the west half of which the defendants assert a right of way to their wharf on the east half.

The trusts are thus declared in the patent:

“Upon trust, in the first place to and for the public purposes of the said City of Toronto, and from time to time to lease and let such and such parts of the said water lots and strips of land as from time to time the Mayor, Aldermen, and Commonalty of the said City of Toronto in Common Council assembled may think fit to order and direct, for such term or terms, not exceeding in any one term the period of fifty years; reserving by such lease or leases such reasonable rent or rents as the said Mayor, Aldermen, and Commonalty of the said City of Toronto in Common Council assembled shall order and direct to be reserved and paid by the lessees; the said rent and rents to be reserved to and for the public uses and purposes of the said City of Toronto; and in the next place upon this further trust, that all such lots or parts of lots as may be used by the said City of Toronto for the uses or purposes of said City, and in the case of leases of such of them as may be leased as hereinbefore directed, the said leases shall respectively contain a clause or covenant that all such lots or parts or parcels of the said lots respectively as may be so used by the said city, occupied or leased as aforesaid, shall be filled up three feet above high-water level within three years from the time of the said leases respectively, or from the time of such occupation by the said City of Toronto of the said lots or parcels of lots respectively, the same to be filled up from the water’s edge of the bay to the south side of the Esplanade, marked, laid down and designated in the plan of the said water lots hereto

annexed; and upon this further trust, that the said City of Toronto shall within three years after the time of the occupation of the said water lots or parts or portions thereof for the said purposes, and in case of the leases of the said water lots or any parts or portions thereof, the said leases shall respectively contain a covenant that within three years from the time of such leasing respectively an Esplanade shall be made and constructed of such materials and according to such plan as shall be devised ordered and directed by the act of the Mayor, Aldermen, and Commonalty of the said City of Toronto in Common Council assembled, the said Esplanade to be not less than one hundred feet in width, and to be made in all the said lots at the place designated in the said plan hereto annexed, and marked in the same with the letter 'O'; and upon this further trust, that all the stores and buildings to be put up and erected upon the said water lots or any or either of them shall in all cases, whether the same be occupied by the said City of Toronto for the purposes of the said city, or whether the same be leased as aforesaid, be built and constructed in such manner, and of such materials, and according to such plan as the said Mayor, Aldermen, and Commonalty of the said City of Toronto in Common Council shall devise, order, and direct; and upon this further trust, that the said City of Toronto shall convey and assure to the different individuals or persons who now are or may be entitled to the lots originally granted, or such parts and portions of the said lots respectively as any person or persons now are or may be entitled to in the said lots, heretofore granted, all and singular such parts and portions of the said strips of land along the bank as adjoin to the said lots heretofore granted, provided always the same shall be conveyed to the person or persons subject to such general regulations as affect the whole, as to buildings thereon, as well as to the regulations respecting the said Esplanade marked 'O' on the said plan, and such as may be made respecting the making of the bank even and regular; and also upon this further trust, that the said City of Toronto shall convey and assure to the said persons respectively that portion of the said water lots which adjoin to and lie on the south of the said water lots already granted up to the line marked on the said plan 'I K,' being the limit of the said lots hereby granted to the said City of Toronto, the same to be conveyed and assured subject to such general regulations as affect the whole, and subject to the provisoes, conditions and limitations herein contained, and all such conveyances and assurances so to be made shall be subject to such conditions as herein are contained; and upon this further trust, that the said land covered with water or water lots which lie to the south of the said water lots heretofore granted or located is not to be used by the said City of Toronto, leased or otherwise departed with than as hereinbefore provided for and expressed, as respecting the persons respectively who are or may be entitled to the said water lots heretofore granted."

The whole of this declaration manifestly contemplates

the actual occupation of the water lots. There is the express requirement that filling in shall be done from the edge of the Bay to the south side of the Esplanade, in other words, solid land is to take the place of what the defendants assert was navigable water. The mandate extends only to the line of the Esplanade, but the right is only limited by the windmill line. Stores and buildings on the water lots are provided for, while some of those water lots ran but a short distance north from the windmill line, the earlier grants having projected far beyond the Esplanade; and the trust to grant the water lots to the persons entitled to the lots in rear of them under the earlier grants, is enforced by the express restriction against otherwise disposing of them, the obvious purpose being to prevent the earlier grantees being cut off from the water by anything erected by other people on the water lots in front of them.

The suggestion that the Crown had not power to give authority to obstruct navigable waters, and that these waters come within the class to which the doctrine applies, is not open to discussion, because the patent is clearly confirmed by the Statutes, 16 Vict. ch. 219, and 20 Vict. ch. 80.

Duncan Cameron was the grantee of lot 8, by patent of 30th September, 1817. He conveyed in 1823 to George Munro. In 1840 Munro conveyed the east half to one Kerr, under whom the defendants make title to the east half of the water lot in question. Munro received from the city a conveyance of the west half, in pursuance of the trusts of the patent and of the statutes, and the plaintiffs are tenants of Munro's devisee.

The wharf owned by the defendants was built, or was owned for many years, by Captain Taylor, whose title the defendants now represent.

That wharf must be held to have been rightfully erected in the lawful use of the water lot, and not wrongfully, as in one of their alternative defences the defendants maintain; and the defendants cannot succeed unless they have

established an easement over the plaintiffs' half of the lot, and an interruption of that easement which justifies the trespass complained of.

Upon this point Mr. Howland has called our attention to several decisions and to the evidence on which he relies, but the views expressed in the judgment of the Court below in connection with the finding of the jury effectually dispose of the matter.

In the face of the evidence of Captain Taylor and of Mr. Tully, it is impossible to say that the jury erred in pronouncing against the contention that the way over the plaintiffs' land was used as of right.

The whole of the evidence respecting the user of the alleged right of way is very general in its character, and has the appearance of being given rather with the idea of shewing that the public generally used the water as a highway, than with the object of proving with anything like precision the enjoyment of a private way appurtenant to the defendants' water lot, for twenty years next before this action.

I have tried in vain to ascertain from the evidence the dates at which, or between which, Captain Taylor owned or employed vessels, or whether his ownership or employment of them was continuous or intermittent.

I do not allude to continual actual user as essential to found a prescriptive right under the statute; but conceding to the dominant owner whatever latitude the construction of the statute adopted in *Carr v. Foster*, 3 Q. B. 581, permits, an appellate Court cannot reasonably be expected to overrule a Court of first instance without something more distinct in the way of dates, and also as to the nature of the user at the different times spoken of than we have before us.

I assume that Captain Taylor ceased to use the premises as early as 1873, because Mr. Chapman is said to have been the occupant from 1873 to 1878. How long before 1873 Captain Taylor may have ceased to occupy is a matter of conjecture.

We are not told that Mr. Chapman owned or employed vessels. He says: "We just used the water on that side," but how or for what purpose he used it is not set down.

After his time the wharf seems to have been disused for three years.

It may be that the defendants the Hamiltons were then let in, but that is left to inference.

From Captain Hamilton's evidence, I suppose his occupation of the premises extended over the years 1881, 1882, and 1883, because he furnished a list of vessels which in each of those years were loaded at the elevator.

Possibly those vessels may have been owned or employed by the Hamiltons, and possibly they may have used the way now claimed, but the evidence, as noted, is silent on the point.

Nor have we any means of judging whether the vessels were of the same class, or the use of the way the same use spoken of in the earlier days, when it is claimed the prescriptive time began to run.

As pointed out by the learned Chief Justice in the Court below, there can be no prescription in respect of the elevator, because, twenty years before action, it had not been built.

The statement of defence does not prescribe in respect of the elevator or even of the wharf, but generally in respect of the water lot, and, as I have said, there has not been any sufficient reason advanced to make us doubt the correctness of the judgment appealed from.

I think the appeal should be dismissed, with costs.

HAGARTY, C. J. O., and OSLER, J. A., concurred.

Appeal dismissed, with costs.

SYLVESTER V. MASSON ET AL.

Patent of invention—Want of novelty.

A patent for a horse rake, the specification of which described as part of the invention "the construction and novel arrangement of a divided axle, with wheels firmly fastened thereon, a friction gripe for engaging with the divided axle," &c. ; the description of the construction and operation stating that "the axle being divided in two parts, permits the wheels to turn in opposite directions ; a piece of iron or steel wire, or cord, or chain, is coiled round each half of the axle, one end of each coil being secured firmly to the rake head, while the other ends of the coil are secured to a foot treadle," &c.

Held, not to be infringed by a rake worked by a strap passed twice or oftener round the inner part of the hub of the wheel elongated for the purpose of receiving it, one end of the strap being attached to the axle, and the other connected with the treadle.

Held, also, that the mode of using the cord was not novel, being essentially the same described in an earlier patent as consisting of "flexible metallic straps which encircle the inner extension of the hubs, one end of each strap being attached to a fixed bearing secured to the axle, and the other to the short end of a lever," &c.

Semble, that neither the circle nor the coil was the subject of either invention, but only modes of using a friction band in connection with another device which was the patented improvement.

Per HAGARTY, C. J. O.—It was not patentable.

THIS was an appeal by the plaintiff from the judgment of Boyd, C., (not reported) dismissing the action, which was for the infringement of a patent.

The points in issue, and the effect of the evidence are clearly stated in the judgment of Patterson, J. A.

The appeal was heard on the 6th of February, 1885.*

W. Cassels, Q. C., for the appellant.

Moss, Q. C., and *C. A. Jones*, for the respondents.

April 17, 1885. HAGARTY, C. J. O.—I am unable from an examination of the evidence to find any intelligible reason for interfering with the learned Chancellor's judgment. He holds that "the Sharp patent is a combination, the Larsen patent is a combination, and the LaDow patent is a combination * * * the paternity of the Larsen patent is perfectly manifest when you look at it. There

**Present*.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

is more resemblance between it and the Sharp patent than there is between it and the LaDow patent."

The learned Judge enjoyed the great advantage of personally inspecting the different machines and seeing them in motion on the land adjoining the Court, and had fully explained to him their respective working. He considered the material difference in the two was the difference in the diameter of the axle; that in the Larsen case the power was mainly derived from the larger diameter of the hub, and that there was a material difference from the LaDow patent, where the diameter was much smaller.

I am wholly unable to understand how the reducing or the enlarging of the hub of an axle, or the use of a flexible band or coil going once round, or instead thereof going twice or a hundred times round, can be the subject of a patent, or a ground for insisting on an infringement.

No new principle of dynamics is discovered. Such matters seem to me to fall wholly within the principles laid down as to mere alterations in form or size or proportion of parts. The machine invented and patented by Sharp (without inquiry as to any of earlier date) may be assumed to be a fair invention, an original combination of certain known mechanical appliances, producing a novel and most useful result. When a machine like this is shewn in action to the mechanical world, it is natural that many improvements may suggest themselves to careful observers.

But I have never been able to understand how the alteration of the size of any part, the shortening or lengthening of a lever or axle, or the enlargement or reduction of any component part, or the increase in the number of coils or bands, can, when applied to the construction of another machine, even if they make it work more smoothly and effectually, become the subject of a patent. The original invention remains. All that is matter of discovery or mechanical invention is taken or pirated, and the details of the various parts altered more or less, as experience shews an opening for improvement in action.

The learned Chancellor held that all these combinations

were good, and that there was no infringement. I do not, as already suggested, understand why such changes as plaintiff makes in his rake entitle him to a patent for the machine as a whole. If the improvement made by him is in itself a novel design, his patent ought to be confined to itself, and no one could infringe it. But he claims for the whole machine as a combination. I am unable to see on what intelligible ground it can be patented as such. But I am willing to rest my decision on the ground taken by the Chancellor, that there was no infringement.

PATTERSON, J. A.—The plaintiff is the assignee of a patent for an invention of one LaDow, and he charges the defendants with infringing that patent.

I understand that a horse-rake when in use is made to dump or drop the gathered hay by some mechanism, by which the forward revolution of the axle is made to lift the teeth of the rake, and which allows the teeth to fall back to their work as soon as the hay is dropped.

The mode adopted by the defendants, in the rake of which the plaintiff complains, is to attach the axle by means of a bracket to one end of a flexible band or strap, which is passed twice or oftener round the hub of the wheel, the inner part of which is elongated to make room for the band, the other end of the band being secured to one of a series of levers, ending in a treadle, on which the driver presses his foot, which action tightens the band upon the hub, and acting like a brake upon the wheel causes the axle to turn with the wheel and lift the teeth. The removal of the pressure allows the band to slacken and the wheel to turn again upon the axle, or the axle to turn within the hub of the wheel, and the rake teeth to fall to their place.

In the machine which the plaintiff makes, the wheels are permanently fixed to the axle, and the axle turns. It is divided in the middle so that each half can move independently of the other. The band, which he describes as a wire or cord, passes several times, six or more, round the

axle, one end being fastened to a bar called the rake head, into which the teeth are inserted, and which is hinged to the axle, and the other end being secured to a lever, which is worked by the pressure of the driver's foot upon a treadle. The diameter of the axle is very much less than that of the hub of the defendant's wheel.

Hay rakes had been made before LaDow's patent, in which a friction band attached to the axle or rake head and to the foot lever was the method by which the forward motion of the machine was made to lift the teeth; but the band did not go more than once round the wheel or the hub. Indeed, it is questioned whether in any of them the band was brought into contact with the entire circumference.

It is shewn that Larsen & Galloway, who contrived the machine which the defendant makes and which is called the Larsen Rake, took the idea of giving the band the second turn from seeing one of the LaDow machines, although they applied it in connection with other contrivances, such as the larger diameter of the hub and a different arrangement of levers. The defendants contend that their machine differs in principle from LaDow's so far as not to be an infringement of his patent, even if his patent is for a machine such as he makes. But they go farther, and contend that coiling the band more than once round the axle is nothing but the application of friction by means of a flexible band, which is not novel, and that it is not specified or described in LaDow's patent.

The learned Chancellor decided in favor of the defendants upon the first of these contentions, and all of them have been again urged before us.

The principal points involved in the contest are thus stated in the fourth of the plaintiff's reasons of appeal, and it would be impossible to state them more distinctly :

" 4. It is not contended, and never has been in this suit, that LaDow was the first to connect a foot-lever to the rake-head with a flexible band, so arranged that a weight placed on the foot-lever causes the flexible band to come in contact with and form (in proportion to the weight) a

frictional connection with the revolving hub or axle of the machine, in order that the power of the horse drawing the machine may be utilized for dumping the rake-head ; but it is contended and established by evidence, that LaDow was the first to connect a foot-lever with the rake-head of a horse-rake by a flexible cord or band carried more than once round the hub or axle of the machine, by which new and useful combination the motion of the revolving axle or hub tightens the flexible band on the hub or axle, thereby making the revolving hub or axle assist the weight on the foot-lever, with which assistance the weight on the foot-lever required to cause the necessary frictional connection may be reduced to an almost imperceptible load."

The patent for the LaDow rake was originally granted on 12th August, 1876. In the specification the invention is said to consist "in the construction and novel arrangement of a divided axle, with wheels firmly fastened thereon ; a friction gripe for engaging with the divided axle ; stops on the rake-teeth ; clearing teeth between the rake-teeth ; and a divided lever for dumping the rake by hand and holding the rake in an elevated position ; all as hereinafter more fully set forth."

Then going on to describe the construction and operation of the rake, the axle and friction band are thus referred to :

"The outer end of each half of the axle is secured firmly to its corresponding wheel D by means of a bolt *e* passing through the outer end of the wheel-hub and axle, thereby securing at all times the rotation of the axle. The axle being divided in two parts permits the wheels to turn in opposite directions. A piece *h* of iron or steel wire, or cord, or chain, is coiled around each half of the axle, one end of each coil being secured firmly to the head B, while the other ends of the coil are secured to a foot-treadle E, which being acted upon by a slight pressure, the coils are made to gripe the axle firmly, and thus lock the axle and head together for as long a period as the pressure upon the treadle is continued, thus enabling the operator, through the forward motion of the axle, to roll the head and its attached teeth up to any desired height, and either hold or carry them in position according to the pressure used upon the treadle.

When the pressure is removed the teeth fall and instantly resume a working position."

The formal claims specify nine inventions. The last five refer to the teeth and levers. The first four are as follows :

" 1st. In a horse-rake, the divided axle AA, with wheels BB fastened upon the outer ends thereof, substantially as herein set forth.

2nd. The combination of a friction gripe with the axle and rake-head, for locking them together for the purposes set forth.

3rd. A friction gripe consisting of a wire or cord, or their equivalent, connected to the rake-head, wrapped around the axle, and connected to the foot-lever for locking the axle to the head, substantially as set forth.

4th. A friction gripe constructed substantially as described, in combination with the divided axle, secured firmly to the wheels, as and for the purposes set forth."

The charge is for infringing No. 3.

A patent had been granted in Canada on 15th June 1874, two years before LaDow's patent, to Dennis P. Sharp for an improvement in horse hay-rakes. In his specifications he said: "My patent invention consists of the following arrangement: L L are flexible metallic straps, which encircle the inner extension *m m* of the hubs. One end of each strap is attached to a fixed bearing, *n*, secured to the axle; the other end is attached to the short end, *o*, of the lever M," &c., &c.—and then after pointing out *inter alia* the advantage of applying the friction band to the hub instead of to the outer rim or tire of the wheel, he concluded: "I do not claim applying the draft or forward motion of the wheels to raise the teeth. Neither do I claim broadly the use of brakes for locking the wheels to the axle for raising the teeth. But what I claim as new and desire to secure by letters patent, is the combination of the flexible straps L L, levers M M, bearings *n n*, cords N N, and shaft P with cranks *u u* and treadle R for connecting the axle with the hubs of the wheels substantially as specified."

I think this specification of Sharp's covers by its terms everything which is included in the terms of LaDow's third claim. A band *wrapped round* an object and a band *encircling* it are the same thing. The object wrapped or encircled is the same, whether it is called an extended hub or half an axle firmly secured to the wheel.

The drawings were referred to for the purpose of shewing that Sharp's band did not really encircle the hub but left a small part of the hub untouched.

Now, if we must read "wrapped round" as meaning "wrapped all the way round," and "encircling" as "making a complete circle," which it is not necessary just now to concede, and if it were allowable to qualify the term "encircling" by looking at the drawing, I could not venture to say that this drawing indicates that the band when in use does not fully encircle the hub. It shews the bearing by which one end is fastened to the axle, and also the lever to the short arm of which the other end is secured; but it does not shew that, when in applying the brake this short arm is depressed, the ends may not meet or even overlap. If they did so meet, could that circumstance be charged as an infringement of La Dow's patent by *wrapping the band round* the hub, when Sharp was only entitled to *encircle* it within the meaning of "encircle" in these specifications read in view of the drawings? The suggestion is too extravagant.

It is argued, however, that the term "wrapped around" in this claim ought to be understood to mean "coiled around," because the word "coiled" is used in describing the construction of the machine, and that this interpretation is aided by reference to the drawings, in which the cord does appear to go more than once round the axle.

I am doubtful of our right so to read this document. The formal claim which defines the precise invention asserted is very commonly narrower than the descriptive portion of the specification, and to extend, by reference to another part of the document, language which may have been carefully chosen in order to express nothing but what is intended to be claimed, might sometimes unfairly expose a patentee to a charge of claiming too much.

Here, of course, it may be said that wrapping once round could not be a new thing while coiling round was old, and, therefore, inasmuch as the term "wrapped around" may mean "coiled around," we ought to understand it in that sense.

I am afraid, however, that the distinction thus attempted

between this claim and that of Sharp is rather plausible than accurate. The claim is not limited to wrapping in the form of a coil, or to any width of strap or diameter of axle. If a thicker axle or broader strap were used, which would give friction enough with one turn, it would be within the terms of this claim; and, assuming novelty in his favor, the patentee would have as much right to a monopoly of the single cincture as he now asserts to the coil.

I believe the true understanding to be, that neither circle nor coil was the subject of either invention; but that Sharp aimed at improving the machine by transferring the friction band from the tire of the wheel to the hub, and La Dow at improving it still farther by the device of the divided axle, the rake-head being separate from the axle, and the friction bands attached to the rake-head and worked by contact with each half of the axle. The mode of applying the friction-band in each case was a necessary part of the description of the improvement; but I understand the specifications to explain it merely as an incident of the improvement, and as the way in which a well known force was made available in connection with the new contrivance, and not as in itself an invention. Sharp got rid of its use on the outer rim and in place of that encircled the hub with it, which he apparently found sufficient, probably adjusting the diameter of the hub and the width of his band by reference to the extent of contact required. LaDow contrived the divided axle, which was something different in detail if not in principle from the elongated hub, and wrapped his cord round the axle, or coiled it round as often as he found necessary to secure the requisite friction. The number of times round would depend on the diameter of the axle and the kind of band he used. He specifies nothing on either of these points, for what seems to me the obvious reason, that his claim was merely for the band round the axle, and not for the method of using it there.

LaDow's specifications for his Canadian patent are

dated 3rd June, 1876. We have in evidence other specifications of his for an American patent for the same machine, bearing date 11th October, 1875. In these he explains more fully the advantage of the divided axle, and the facility which his contrivance affords for equalizing the pressure applied to, and the power derived from each wheel. He describes the wire or cord as being "wrapped a number of times round each half of the axle," not specifying the diameter of the axle or the number of turns, and he says, amongst other things: "The advantages gained by wrapping the bands several times around the axle or axles are, first, by so doing a sufficient friction-surface is obtained directly upon the axle, without pulleys or equivalents, to enable the operator to discharge the load with ease." This confirms the view I have suggested that the object of wrapping more times than one is to gain, when the axle is small, the extent of surface for contact, which would be afforded by a larger axle, or by a pulley upon the small one like the appliance which in the Meyers patent is called a friction wheel. He proceeds: "And second, the spiral band, encircling a small diameter, winds up and tightens around the advancing axle, while the opposite band unwinds and loosens around the retreating axle, although a uniform pressure is applied at the same time to both bands through the equalizing device and foot lever, thus permitting the wheels to turn in opposite directions without straining the parts or use of ratchets, while compelling either wheel to raise the teeth, and also to act more in concert when turning curves than can be done by any system of ratchets or gearing."

This passage also tells against the spiral band being thought of as a new idea, or as anything but a mode of advantageously obtaining the requisite friction from a divided axle of small diameter.

In these American specifications there are the same number of claims as in the Canadian ones, but they differ in their character. I shall read five which relate to the axle and band:

"1. In a horse hay-rake, the combination, with parts rotating permanently with each traveling wheel, of a controllable friction dumping de-

vice, acted upon by each wheel in its forward movement only, and a lever for causing said friction device to bite the rotating surface at will.

2. A friction-gripe applied spirally to the revolving portion of a wheel-rake, in combination with suitable mechanism to determine its stress upon said revolving portion, for the purpose of raising and lowering the teeth.

3. The combination of a revolving axle, a rake-head hung in rear thereof, a friction-gripe connected with the rake-head and passed around the circumference of the axle, and a lever for tightening said gripe around the axle.

4. The combination of a friction device and a divided axle having the wheels rigidly affixed thereto.

9. The combination of a friction-gripe with the axle and rake-head, for locking them together, for the purposes set forth."

Here the spiral gripe is mentioned, not as a substantive invention, but only in combination with other mechanism the uses of which are described in the passage to which I have alluded, and I take the whole specification, and these claims as much as any part of it, to bear out the impression which I derive from the Canadian patent, that the coil is not put forward as by itself an invention.

The theory advanced in the fourth reason of appeal, which I have just read, is not supported by anything to be found in the patent or in the specifications. If it were clear that a saving of power were effected, or less power required to be applied to the foot lever, in proportion to the number of times the band passed round the shaft, the proof would touch the utility of the contrivance rather than its novelty as an invention. But the scientific problem has not been placed by the evidence beyond question.

Of the several witnesses who were examined, I believe only one, Mr. Robb, professes to be a skilled mechanical engineer or expert in such matters, and he says nothing on the subject. Amongst the others, those who are practically conversant with these machines differ materially both as to the principle and as to the result of experiments.

One gentleman gives an opinion, which seems to accord with one's general idea of mechanical force, that if power is gained it must be at the expense of rapidity of action, the shaft having, as he expresses it, "to take up the slack"

after the lever power has been applied before the teeth can be raised. I do not think we are in a position upon the material before us to decide the scientific question. We do not know how to appreciate the opinions of the witnesses, and we have practically no expert evidence. But we do not, in my opinion, reach the inquiry as to the utility of the contrivance either absolutely or in comparison with other machines on which this professes to be an improvement.

I agree with the learned Chancellor that the plaintiff's patent, if valid, would not be infringed by the defendants, who use a hub of large diameter, passing their friction band more than once round it, because I do not construe the patent as intended to give a monopoly of the right to use a band in that manner. And I am also of opinion that if the patent can properly be construed to relate to the mode of applying the friction band, the invention described had already been patented by Sharp in Canada.

I think, therefore, that we should dismiss the appeal, with costs.

BURTON and OSLER, JJ. A., concurred.

Appeal dismissed, with costs.

KENNY V. MACKENZIE.

Party wall, agreement to pay for—Covenant not running with land.

C. and the defendant were owners of adjacent lots, and C. being about to build on his lot agreed by writing under seal to erect a party-wall on the dividing line, and equally on both lots, defendant agreeing to pay for the half of the front forty feet thereof when erected, and for the rear portion whenever defendant should require to use it. Subsequently C. sold and conveyed his lot to the plaintiffs in fee by deed containing the usual statutory covenants. Some years later defendant erected a building on his lot, making use of the rear part of such party-wall, by reason of which he became liable to pay \$98.65 and interest therefor, and did accordingly pay the same to C. In an action by the plaintiffs, as assignees of C.'s interest in said land, against the defendant to recover the sum so due in respect of such wall:

Held, that the plaintiffs were not entitled as vendees of C. to recover: the right to payment of the sum stipulated to be paid for the wall under the covenant with C. not having passed under the conveyance by C. to the plaintiffs.

THIS was an appeal from the judgment of the County Judge of the county of Lambton sitting in the first Division Court of that county.

The action in the Court below was brought by the plaintiffs against the defendant for the recovery of the sum of \$98.65 with interest thereon, amounting in all to \$106.50 under the following circumstances:

One William Chapman, of the town of Sarnia, in the county of Lambton was prior to the 27th of December, 1869, owner in fee of town lot lettered "E" on the east side of Front street in said town, and D. Mackenzie, the defendant, had been long prior to that date and still was the owner in fee of the adjoining lot lettered "D."

On the 23rd of April, 1868, the said Chapman being about to erect a brick store on his lot, he and the defendant entered into an agreement under seal to build a party wall on the dividing line and equally upon both said lots, by which said agreement it was stipulated that Chapman should supply all material and erect said wall; and Mackenzie agreed to pay for half of the front forty feet of said wall at the time of its erection and for the half of said wall beyond the forty feet whenever he, the said

Mackenzie, would require to use it. Subsequently Chapman erected the wall in the manner described.

On the 22nd of December, 1869, Chapman conveyed to the present plaintiffs the said lot lettered "E" by deed in fee simple with the usual statutory covenants, and the plaintiffs thereupon entered into possession of said lot and premises and had continued to own and occupy the same ever since.

The defendant prior to the 1st of August, 1883, erected a building on his said lot by which he made use of such party wall and thereby in pursuance of said agreement there became due and payable from him to the party entitled thereto the said sum of \$98.65.

The plaintiffs by notice in writing served on the defendant on the 24th of August, 1883, demanded payment from him of said sum of money, and in said writing stated that interest would be charged thereon from that date.

The defendant, notwithstanding such notice, did afterwards pay over said amount to said Chapman taking indemnity from him therefor.

The question for the opinion of the Court was, whether the plaintiffs were entitled to payment of said sum of \$98.65 under the said statutory deed of conveyance in fee from Chapman to them, and also to interest thereon from the 24th of August, 1883.

The learned Judge found in favor of the defendant and dismissed the action of the plaintiffs, who thereupon appealed to this Court, and the appeal came on to be heard before Hagarty, C. J. O., on the 5th of December, 1885.

Aylesworth, for the appellants. The conveyance from Chapman to the plaintiffs included, under the statute, all edifices, easements, and appurtenances whatsoever in anywise appertaining to the lands therein comprised or with the same used, occupied, and enjoyed. The half of the wall which stood on the defendant's soil enjoyed an easement over the plaintiff's land for its support. It was not therefore at all in the same position as if it had been some

entirely independent structure erected by Chapman on Mackenzie's soil under a contract that Mackenzie should pay for it when he used it. The plaintiffs took their land with an obligation to support the half of the wall resting on the defendant's soil: they should then be entitled to the corresponding benefit when the wall they were supporting was used. The case of *Bloch v. Isham*, 28 Ind. page 37, relied on by the defendant is directly opposed to the case of *Burlock v. Peck*, 2 Duer 90, the decision of a Superior Court in New York State and the reasoning of the judgment in which commends itself more than that of the former.

Lash, Q.C., for the respondent. In *Spencer's Case*, 1 Sm. L. C. 8th ed. 68, and the notes, the law on this subject is clearly stated and summarised. In *Thomas v. Hayward*, L. R. 4 Ex. 311, it was held that in the lease of a public house a covenant by the lessor for himself, his heirs, assigns, &c., not to build or keep any public house within half a mile of the demised premises did not run with the land so as to enable the assignee of the leasehold to sue on it. The case of *Burlock v. Peck*, relied on by the appellant, has been questioned, if not overruled in later cases; and in *Bloch v. Isham*, 28 Ind. 37, the Court refused to follow *Burlock v. Peck*, following instead the case of *Weld v. Nichols*, 17 Pick, 538, where the Supreme Court of Massachusetts decided that a covenant similiar to the one in question here was a personal covenant only and did not run with the land. *Cole v. Hughes*, 13 Am. Rep. 611, 54 N. Y. 444, decided in 1873 was similar to *Bloch v. Isham* though more complicated in its circumstances, and there also the covenant was held to be a personal one only; and in that case all the authorities on the subject are collected and the case of *Burlock v. Peck* is referred to as the only adverse decision, and is disapproved of. *Hart v. Lyon*, 90 N. Y. 663, (decided in 1883) *Roche v. Ullman*, 104, Ill. 11; *Joy v. Boston Penny Savings Bank*, 115 Mass. 60; *Scott v. McMillan*, 76 N. Y. 141, were also cited.

November 6, 1885. HAGARTY, C. J. O.—I am of opinion that the learned Judge in the Court below was right in holding that the plaintiffs could not recover.

When they purchased from Chapman they might have bargained for the advantage of this contingent claim against defendant, and had it assigned to them as a chose in action ; that is, if they had been aware of its existence.

Chapman and his personal representatives would have had the right to enforce the claim whenever the contingency happened.

The plaintiffs bought Chapman's lot. They find a party wall running from front to the rear, built equally on the two lots.

They and the defendant thus own this wall in severalty. It became a party wall built by agreement under seal between the then owners on good consideration, and neither they, nor any person in privity of estate with them, could I think, interfere with its existence as such party wall.

The defendant then uses that part of the wall resting on his own land, not intruding on the plaintiffs' land in any way.

I cannot see how it could be successfully contended that his covenant to pay Chapman and his assigns whenever he used it, was a covenant so running with the land as to pass to the plaintiffs under their deed.

The user of the wall on defendant's own land was not anything done to, or on, or affecting the plaintiffs' lot; and I see nothing in the extended words of our statutory conveyance form to enlarge or change the nature of the right, estate, or interest conveyed, so as to pass such a claim as this to the purchaser.

The ordinary rule as stated in *Platt on Covenants*, 461, is that, "in order to make a covenant run with the land, whether the estate be granted for an estate of inheritance, or for a term of years, the performance or non-performance of it must affect the nature, quality, or value of the property conveyed, independently of collateral circumstances, or must affect the mode of enjoying it."

The case cited of *The Mayor of Congleton v. Pattison*, 10 East 130, explains the distinction fully. The case is stated again at page 478 of *Platt*.

In the second resolution in *Spencer's Case*, 1 Sm. L. C. Amer. Ed., 1885, p. 146, the distinction between a matter directly affecting the land, or for [doing something on it, and collateral matters, is pointed out.

In this great leading case, and in the elaborate notes running over nearly 200 pages, will be found a multitude of cases, English and American, on the general subject. No case like this in its facts appears among the English cases.

The learned Judge cites the case from Indiana, of *Bloch v. Isham*, 6 Am. Law Reg. 8, and which refers to *Weld v. Nichols*, 17 Pick. 538, where Shaw C. J., takes the same view.

Mr. Aylesworth refers to *Burlock v. Peck*, 2 Duer 90, in which the New York Court differs from the Indiana decision.

Mr. Lash then refers to *Cole v. Hughes*, 54 N. Y. 444, (1873), a much later case, which supports the learned Judge's decision, and questions *Burlock v. Peck*.

In *Cole v. Hughes* there is an extract from *Washburn* on Real Property strongly supporting the decision. *Cole v. Hughes* is noticed in notes to *Spencer's Case*, 1 Sm. L. C. 179 (Ed. of 1885); *Joy v. Boston Savings Bank*, 115 Mass. 60, is to the same effect; also *Scott v. McMillan* (1879), 76 N. Y. 141.

There is a summary of cases in which the covenant is held not to run with the land in *Woodfall*, L. & T. 149 (Ed. 1877.) No case is as to party walls, but the general subject is well illustrated by the authorities. At p. 575 it is stated according to *Matts v. Hawkins*, 5 Taunt. 20, that the proprietors are not tenants in common of a wall built half on the land of each. "In contemplation of law such wall constitutes two distinct walls, and had to be so described under the old system of pleading," citing *Murley v. McDermott*, 8 A. & E. 138.

I think the later American decisions are in favor of defendant's view, and in accordance (as I think) with the principles of law which we find in the English books.

There is neither privity of estate nor privity of contract between the plaintiffs and defendant, and I think the judgment below is right, and that the appeal must be dismissed, with costs.

Appeal dismissed, with costs.

FOOTT V. McGEORGE ET AL.

Crown grant—Deficiency in land—Compensation—Trustee and cestui que trust—Restraint on anticipation—Bond fide purchaser—Notice.

The plaintiff, who was *cestui que trust* of certain lands held by B. & P. under a settlement which provided against anticipation, became a party to an instrument, in which B. & P. were named as parties, but did not execute, which, amongst other things, declared that B. & P. had no real interest in certain lands which had been allotted to and were subsequently granted to them by a patent from the Crown, in which they were described as trustees for the plaintiff, for the purpose of making compensation for a deficiency in the settled estate; and that the person really entitled to such compensation was her husband, G. W. F. Subsequently B. & P. executed a similar declaration, and afterwards G. W. F. joined with them in a conveyance of these lands to a *bond fide* purchaser (E.), under whom the defendants claimed.

Held, [affirming the judgment of BOYD, C. GALT, J., dissenting;] (1) That the lands granted as compensation were subject to the terms of the settlement: (2) That the plaintiff's declaration in favor of her husband was inoperative in face of the restraint upon anticipation: and, (3) that the terms of the grant from the Crown were sufficient to put E. on inquiry, and that he and the defendants must be taken to have had notice of the settlement, and plaintiff was therefore entitled to recover.

Per GALT, J.—The patent granting the compensation described B. & P. as trustees of the plaintiff, but did not grant the lands to them as such, and it could not be assumed, in the face of the declarations as to the title of G. W. F., that the plaintiff was the party entitled to such compensation.

Foott v. Rice, 4 O. R. 94, affirmed.

THIS was an appeal by the defendants from the judgment of Boyd, C., pronounced on the 18th of June, 1884, declaring the plaintiff entitled to the possession of lot 2 in the 12th concession of the township of Chatham in the county of Kent, and declaring that the defendants held this land subject to the trusts declared in a deed of settlement made by James Black Perrier on the 15th of January,

1852, and that, subject to the satisfaction of any sum to which the defendants might be found entitled upon the accounts being taken in respect of taxes, improvements, and rents and profits, the plaintiff was entitled to have the lands conveyed to such persons as she should appoint as trustees for her, on the same trusts as declared in the aforesaid deed of settlement.

The judgment of the Chancellor was as follows :

The facts of this case it is agreed are the same as those in *Foott v. Rice*, (a) 4 O. R. 94, with one exception. That is that in this case the patent of the land in question issued after the declaration by which the plaintiff renounced her rights in the land awarded as compensation. The patent here was granted on the 11th November, 1857, and the deed of renunciation was executed on the 4th June, 1857. The patent, however, issued in disregard of this renunciation, and was expressed to be to the grantees as trustees of the plaintiff and in compensation for the deficiency of the land previously settled upon her. It seems to me *that* difference of fact only strengthens the claim of the plaintiff, because, notwithstanding her alleged abnegation of benefit from or in the compensatory land, the patent issues in trust for her. So that the reasonable inference of any purchaser cognizant of the documents would be that the renunciation was not treated as operative, and that with knowledge of it the Crown still regarded the plaintiff as the proper beneficiary of its bounty. Apart from this single point it is not needful for me to form any opinion upon the other facts of the case, inasmuch as it is my duty to follow the decision of the court in *Foott v. Rice*. My judgment will therefore be the same as in that case.

The appeal was heard on the 13th of May, 1885. (b.)

C. R. Atkinson, for the appellants.

Robinson, Q.C., and *Wm. Douglas*, for the respondent.

(a) A decision of the Queen's Bench Division.

(b.) *Present*.—BURTON, PATTERSON, OSLER, JJ.A., and GALT, J.

June 23, 1885. BURTON, J.A.—This is one of a class of cases which have given rise to the proverb, that “hard cases are apt to make bad law.” One cannot avoid feeling that the judgment against the defendants, who are purchasers for value, must operate harshly upon them, and that it is one against which a Court would feel anxious to relieve if it could see sufficient grounds for doing so consistently with legal principles.

The plaintiff has only an equitable estate in the land but as the trustees who were clothed with the legal estate have conveyed that legal estate to the purchasers, she is necessarily driven to bring a suit in her own name. What the plaintiff contends here is, that the purchasers, having acquired the legal estate with notice of the trust, stand in no better position than the trustees, and that she is entitled to maintain a suit against them, as she would have been entitled to do against the trustees for the purpose of being placed in possession of the property to which she is entitled for life.

The facts are so fully stated in detail in the judgment in the Court below that I propose to make but a brief reference to them, and only so far as may be necessary to make my statement intelligible.

George Wade Foott was at one time entitled to claim from the Crown the east half of lot 16 in the 1st concession of Dover East, but before the patent issued, on the 12th August, 1837, he conveyed it as containing 100 acres in consideration of £220 to James Black Perrier, a brother of his wife, giving full covenants for title as if he had been absolutely seized in fee simple.

The patent issued in February, 1838, and in November, 1848, by an instrument which recited the issue of the letters patent he confirmed that conveyance.

Sir Anthony Perrier, the father of Mrs. Foott; made his will in 1845, and died in the same year. He gave all his property, with the exception of that which he devised to James, to two other sons, and he then made a devise of that other property to James on the condition that he

settled the property he had acquired from George Wade Foott to his, the testator's, daughter Mrs. Foott. So that, in effect, Mrs. Foott was obtaining under her father's will this property as her share of the estate, and it was made an express stipulation and condition that James should make it over by fit and proper deeds in trust for his daughter, free from the debts, control, or intermeddling of her husband, by *such conveyance* as he might be *called on or required by Mrs. Foott* to make for the purpose of so settling it upon her to her separate use.

In pursuance of this arrangement, Mrs. Foott made a requisition upon her brother James on the 17th April, 1851, to convey the property in Dover to her separate use, and on the 15th January, 1852, a deed was executed to which she was a party, in which the foregoing facts are recited, and by which the land was conveyed to Messrs. Beatty and Prince as trustees for her, with a clause against anticipation.

It would seem then that this lot, assumed to contain 100 acres, was sold to James Perrier for value, he having the intention at the time he purchased of residing upon it, and if, as subsequently was discovered, it contained less than 100 acres, any claim to compensation would seem properly to belong to him or his assigns, and not to Mr. Foott who had sold it as 100 acres, and received full value for it.

In fact the discovery of the deficiency would appear not to have been made until about the year 1855 or 1856, some years after James had, by the direction of his father, conveyed to the trustees of Mrs. Foott.

On the 12th January, 1856, the trustees appointed Mr. Foott attorney for them to demand compensation for the deficiency in the Dover lot, and he proceeded to seek the compensation, and on the 15th September succeeded in obtaining an order in Council, which stated that the application was put forward by the Messrs. Perrier, as trustees for Mrs. Foott, as to the west half, and by James Beatty and Albert Prince, merely describing them as trustees, as to the east half.

The order proceeded to state that the Attorney General

was of opinion that compensation could be safely made to those trustees, and moreover, that Mr. Foott himself might have personally claimed such compensation, a conclusion not so apparent as the former one.

This order was followed up by a letter from the commissioner of Crown lands to the agents for the disposal of Crown lands, referring generally to the order in question as authorising a grant to the Messrs. Perrier and to Messrs. Beatty and Prince, trustees for Mrs. Ellen Foott, in compensation for deficiency in lot 16 and requesting them to allow a selection to the amount of £735 to be made by the agent for the parties, Mr. George Wade Foott, from the Crown lands placed under their charge for sale.

Mr. Foott appears to have made several attempts to have the lands which he purchased under this authority granted to his nominee, a person to whom he had sold or was contracting to sell, but these were ineffectual, and the patent eventually with his consent issued to the trustees. He was more fortunate in reference to the balance of the compensation, payable in scrip, which he succeeded after several years' correspondence in getting handed over to himself personally, but it was otherwise with regard to the lands which he selected in part payment of the compensation, and the patent issued on the 11th November, 1857, to James Beatty and Albert Prince, trustees of Ellen Foott, wife of George Wade Foott, in compensation for deficiency in the east half of lot 16.

In the meantime, viz., on the 4th June, 1857, a document was executed by James Perrier and Ellen Foott, which recites the deed of January, 1852, which Perrier had executed in pursuance of the directions of Sir Anthony Perrier and as a condition precedent to his taking any interest under his father's will. It then proceeded to refer to the fact of certain lands having been ordered by the Government of Canada to be granted to Messrs. Beatty and Prince, as such trustees, as compensation for the deficiency in said lot 16, and then alleges that they have no real interest therein either as trustees or otherwise, they having been

named as grantees of such compensation from their being the present owners of lot 16 : that George Wade Foott is the beneficial grantee of such compensation, and the original purchaser of the lot 16.

It then recites the desire of James Perrier and Ellen Foott to declare that the trustees are the nominal and not the beneficial owners, either as trustees or otherwise, of the lands so granted as compensation ; and then proceeds to declare that they are not, nor is either of them, in any way interested in the lands so ordered to be granted as compensation for such deficiency : and that the parties of the third part (that is to say the trustees, although they do not execute the instrument) hold the lands so ordered to be granted as trustees of and for, or attorneys for, the said George Wade Foott, and not otherwise, and are to dispose of such lands as the said George Wade Foott may by instrument under his hand and seal, direct and appoint.

In the light of the frequent letters of Mr. Foott to the Department endeavoring to get the issue to himself in place of his wife's trustees, it is not difficult to trace the parentage of this document whatever may be its value. It was an easy thing for Mr. Perrier, who had no interest in the land at this time, to make such a declaration ; but it is going a long way, as I observe one of the learned Judges does in the Court below, to refer to him as the creator of the trust. He had nothing to do with the creation of the trust further than to carry out the instructions of the real settlor, the testator Sir Anthony Perrier, a failure to do which would have deprived him of the benefits secured to him under the will. Any attempt on his part to derogate from what was in truth the devise of Sir Anthony in favor of his daughter was, of course, a nullity, to use no stronger term. It would be a monstrous thing if a person who had ceased to have any interest in the land could, by a mere declaration, defeat the testator's intentions and deprive his devisee of the full benefit intended for her. So that the question resolves itself, as between Mrs. Foott and her trustees, into whether this declaration made by a married woman, in whose favor

a settlement is made with a clause against anticipation, is to render the settlor's wishes and intentions nugatory, and expose the settled property to all the risks which it was the intention of the settlement to prevent.

Mrs. Foott denies all knowledge of having executed such an instrument, and I can well believe that she was never informed of its true nature, but I think that in law it would make no difference if she had known it—that she had no power to anticipate and that her consent affords no justification to her trustees, who must be presumed to know the law.

The question is not now between her and her trustees, who have conveyed to persons who were purchasers for value, and who are relieved, if they can be said to have purchased without notice; if with notice, they stand in the same position as the trustees, and the plaintiff is entitled to the same remedies against them that she would have against the trustees so far as the enforcement of the claim to possession goes.

They admit, and the case has been argued on that footing, that they had such notice as the patent affords, but it is contended that that is not such actual notice of the terms of the settlement as is sufficient to charge them.

I think there is no room for that contention, and agree with my brother Cameron that having notice that the parties were trustees for a married woman was sufficient notice of the settlement, an examination of which would have shewn that the trustees had no power to deal with the land as they have done.

I am of opinion therefore that the decree of the learned Chancellor ought to be affirmed and this appeal dismissed, with costs.

PATTERSON, J.A., concurred in dismissing the appeal, with costs.

OSLER, J.A.—This is in substance though not in form, an appeal from the decision of the Queen's Bench Division of

the High Court in the case of *Foott v. Rice*, 4 O. R. 95.

The plaintiff sues as *cestui que trust* or beneficiary under the deed of the 15th January, 1852, and the object of the action, which in form is one merely for the recovery of land, is to bring the land sued for into settlement, under the trusts of that deed.

These trusts so far as they are important in the present inquiry may be briefly stated as [being for the sole and separate use of the plaintiff during her life, free from the control of her husband and without power of anticipation, and after her death for such person as she should by deed or will duly executed in accordance with the terms of the settlement appoint.

The land in question was granted by the Crown on the 11th November, 1857, to Messrs. Prince & Beatty, who are described in the patent as "trustees of Ellen Foott, (the plaintiff) wife of George Wade Foott," and the grant is therein expressed to be "in compensation for deficiency in the east half of lot No. 16 in the front concession on the Thames of the township of Dover East," that being the property embraced in the settlement.

The plaintiff's right to recover mainly rests upon two propositions, namely, (1) that the trustees of the settlement, and not the settlor, or her husband, or any other person, were the parties to whom, in their fiduciary character, the compensation for deficiency rightfully belonged, and to whom, as regards this land which is part of it, it was properly granted: and (2) that Emery, under whom the defendants claim, had notice of their title when he acquired the property.

Upon the most attentive consideration I have been able to give to the case, I agree with my brother Armour that the right to claim compensation for the deficiency was in the plaintiff's trustees, and not in her husband George W. Foott or her brother James Black Perrier, the settlor. The east half of lot 16, in which the deficiency occurred, never really belonged to George W. Foott as he had, for valuable consideration, before the issue of the patent, conveyed all

his right and interest therein, describing the half lot as containing 100 acres, to James Black Perrier, to whom, after the issue of the patent, he also executed a deed of grant, release, and confirmation thereof.

Under the terms of his father's will James Black Perrier was bound, in consideration of the devise therein made to him, to relinquish in trust for Mrs. Foott all and every his estate, interest, and claim "in said tract of land," that is to say the east half of 16, which he had acquired as containing 100 acres; and he did accordingly do so by the deed of the 15th January, 1852, already referred to. There is nothing in the evidence which justifies us in assuming, contrary indeed as such assumption would be to the terms of the deed, that either of the grantors reserved any right to the compensation, or did not convey, or did not receive consideration for, the property as containing the acreage it was supposed and represented to contain. That being so, it would seem to follow, as a matter of course, that the right to the compensation would be in those grantees during whose title the deficiency was discovered and whose loss it was. They, in this case, were the plaintiff's trustees, by whom the claim for the compensation was made, and to whom it was in fact granted.

The compensation thus obtained by them for the deficiency in the trust estate, would form part of the *corpus* of the estate and would therefore be subject to the terms of the settlement, and among others, to the restraint upon anticipation.

Butler v. Cumpston, L.R. 7 Eq. 16, cited by Mr. Atkinson, relates merely to the wife's savings from the income of separate estate settled on her without power of anticipation, her investments of which are her separate property over which she has absolute dominion, unfettered by the settlement. The case is no authority for holding that anything which in point of law forms an accretion to the *corpus* of the estate is in the same position as the savings from the income.

I also agree that Emery and the defendants must be

taken to have had notice of the settlement from the fact that in the patent the vendors of the former are described as trustees of the plaintiff, and that the land is expressed therein to be given as compensation for deficiency in the east half of lot 16. This was a circumstance affecting the property of which the purchasers had actual notice and if they had made the inquiry which was naturally suggested by it they would have been led directly to the trust deed. It is true the notice is constructive notice only of the latter, but that is sufficient where it is not a question of defeating a registered title, but of affecting a purchaser with notice of the trusts to which the property is subject in the hands of his vendor : *Boursot v. Savage*, L. R. 2 Eq., 134 ; *Jones v. Smith*, 1 Hare, 43, 55 ; and see the authorities referred to in W. & T. L. C., 4 ed., vol. 2, pp. 51, 54, 55 ; *Story's Eq. Jur.*, vol. 1 sec. 400 ; *Pomeroy's Eq. Jur.* vol. 2, secs. 626-630.

The defendants are not in a position to invoke the aid of the rule acted on in *Jones v. Smith*, *supra*, and in *Re Bright's Trust*, 21 Beav. 430, that notice of a deed accompanied by an erroneous statement of its contents is not necessarily notice of its real contents, for here there was actual notice that the property was in some way affected with the plaintiff's interest, and, except in the recital of the conveyance to Emery, there is no erroneous statement of the trust deed. But that was a statement of the very mode in which the trustees were authorised to convey, not of something collateral, or an erroneous statement that the lands were not in fact affected by the trusts. The grantors professed to convey in their character of trustees of the plaintiff, and it was manifestly incumbent on the purchaser to assure himself that their power was truly recited.

If I am right in holding that the compensation belonged to the trustees, and that the defendant had notice of the trusts, on what ground can the plaintiff's title be defeated ?

The defendants urge that the clause against anticipation was improperly inserted in the trust deed, because not

required by Sir Anthony Perrier's will. This, however, is no concern of the defendants. The clause is usual and proper, and was at one time considered to be "only an unfolding of all that is implied in a gift to the separate use:" *Parke v. White*, 11 Ves. p. 209. It may be seen from the case of *Butler v. Cumpston*, L. R. 7 Eq. 16, *supra*, that it was quite within the right and power of the plaintiff to require as she did that her settlement should be so framed.

Then it is said that the so called indenture of the 4th June, 1857, which is, however, the mere declaration or statement of the plaintiff and of James Black Perrier, operates as a renunciation of their interest in the compensation, and is effectual in connection with the conveyance by the trustees to vest the legal and equitable estate in the land in Emery.

The answer to this contention is, that if George W. Foott had no interest in the compensation, and Perrier had none, or none that he could not have been compelled to convey to the trustees, his declaration was merely futile and inoperative. Nor was the plaintiff's less so, since it could not stand on higher ground than a release or conveyance of the separate estate, which, in the face of the restraint upon anticipation, would have been quite ineffectual.

I think there would be great difficulty in holding that an instrument of this kind, which does not refer to any particular land, which was made before the issue of the patent, without any of the formalities required by law for the protection of married women parting with their estates—*Hodges v. Hodges*, 20 Ch. D. 753, per Fry, J.,—and notwithstanding which the patent was afterwards issued to the trustees, can have any effect upon her right to complain of their breach of trust in parting with the trust estate.

I cannot see that any case has been made for affecting her on the ground of acquiescence or fraud. So far as the evidence enables us to judge, the inference is, that the trustees made no attempt to perform their duties, to pro-

tect her from the influence of her husband, or to inform her of her rights.

I think the appeal should be dismissed, but, looking at all the circumstances of the case, I am content that it should be dismissed, without costs.

GALT, J.—The facts of this case so far as concerns the original settlement and allowance of compensation are so fully set out in the case of *Foott v. Rice et al.*, reported in 4 O. R. 94, that it is unnecessary to repeat them. The circumstances of the present case are very different, however, from those on which the decision in that case turns. By deed of 15th January, 1852, James Black Perrier, for the consideration therein mentioned, conveyed the east half of lot 16 in the first concession Dover East to James Beatty and Albert Prince as trustees for Ellen Foott, the respondent, “to the sole and separate use of the said Ellen Foott, and it is hereby agreed and declared that these presents are upon this express condition, that the said Ellen Foott shall not and will not at any time during her life, sell, assign, alien, transfer, convey, make over, or in any way affect, charge, incumber, or prejudice the said eastern half or moiety of the said lot or lands so hereby assigned, &c., and it is further agreed and declared that should the said Ellen Foott violate said agreement in any way whatever, or cause, or permit it to be done, without the sanction or concurrence of the said party of the first part in writing being first had and obtained, then immediately thereupon this present assignment and every covenant, matter, and thing herein contained shall cease, determine, and be absolutely null and void to all intents and purposes, and the said lands and premises so hereby assigned, or intended to be, shall immediately revert to and be vested in the said James Black Perrier, his heirs and assigns, the same and in like manner as if this present deed had never been executed.”

The deed of 4th June, 1857, purports to be made by the said James Black Perrier, the said Ellen Foott and the said James Beatty and Albert Prince, but is not executed by the latter parties. It recites the deed of 15th January, 1852, and then proceeds: “And whereas certain lands

have been ordered by the Government of Canada to be granted to the said parties of the third part (James Beatty and Albert Prince) as such trustees as a compensation for a certain deficiency in the quantity of the said eastern half of said lot 16, but the said parties of the third part have no real interest therein either as such trustees or otherwise, they having been named as grantees of such compensation merely from their being the present owners of the said east half of lot 16; and whereas the beneficial grantee of such compensation is George Wade Foott the husband of the said Ellen Foott and the original purchaser of the said eastern half of said lot 16; and whereas the said parties of the first and second parts desire by these presents to declare that the said parties of the third part are the nominal and not the beneficial owners (either as trustees or otherwise) of the said lands so granted as compensation: Now this indenture witnesseth:

“First. The said parties of the first and second parts are not, nor are either of them, their heirs, executors, administrators, or assigns, in any way interested in the said lands so ordered to be granted as compensation for such deficiency.

“Second. The said parties of the third part hold the said lands so ordered to be granted as trustees of and for, or attorneys for, the said George Wade Foott, and not otherwise, and are to dispose of such lands as the said George Wade Foott may, by instrument under his hand and seal, direct and appoint.”

It is to be observed that at the time when the above deed was executed the land now in question had not been purchased from the Crown. On 15th September, 1856, an order in Council was made fixing the amount of compensation for deficiency in lot 16 in 1st concession Dover East at £735. On the 9th September, 1857, George W. Foott purchased the land now in question, being lot No. 2 in 12th concession township of Chatham, 200 acres at 5s. per acre; and on 13th October he wrote to the Commissioner: “I will thank you to send me the patent in the names of James Beatty and Albert Prince, Esq., on account of my claim;” and on 11th November, 1857, a patent was issued granting “unto James Beatty, of the city of Detroit, and Albert Prince, of the town of Sandwich, trustees of Ellen Foott, wife of George Wade Foott, in compensation for deficiency in the east half of lot 16 in the 1st concession on

the Thames, in the township of Dover East, their heirs and assigns for ever, all that parcel or tract of land, being lot 2 in 12th concession Chatham, &c."

I have already mentioned that in the deed of disclaimer executed in June, 1857, the trustees James Beatty and Albert Prince, although named therein as parties thereto, did not execute the same, but on the 11th day of February, 1861, seven years before the sale to Emery, they did execute a deed whereby they declare that they have and claim no interest as trustees for Ellen Foott, but that the land and balance of compensation money are the property of George Wade Foott.

On 2nd November, 1864, the said Beatty and Prince, ' trustees of Ellen Foott, wife of George Wade Foott, of the first part, George Wade Foott of the second part, and Emery of the third part, conveyed the said land to the said Emery, under whom the defendant claims."

The plaintiff, by her statement of claim, asserts that "the Government of Canada, on the 6th March, 1857, granted to the said trustees Beatty and Prince as trustees for the plaintiff, and on the trusts of the said deed of 15th January, 1852, among other lands lot No. 2 in the 12th concession of the township of Chatham in the County of Kent, in compensation for the deficiency in the quantity of land, as patented, of the said east half of said lot No. 16 in 1st concession of the township of Dover East, and the said trustees accepted the same in the terms of the said trust."

This allegation is clearly disproved; the patent was not issued until the 11th November, 1857, and was not issued to Beatty and Prince as trustees, and issued on the request of the said George Wade Foott, who had himself purchased the land on 9th September, 1857. The reference to the 6th March in place of 11th November doubtless arose from the fact that the patent in evidence in the trial of *Foott v. Rice* was executed on the former day. In the meanwhile, however, the plaintiff, with the consent and approval of her brother James Black Perrier, had, on 4th June, 1857, expressly disclaimed any interest in any compensation which might be or which had been awarded for any deficiency.

It was contended on behalf of the plaintiff that the deed of 4th June, 1857, was not binding on her, as it was not executed with the formalities required in conveyances of real estate by married women, and that she had no power of renunciation. This assumes that the compensation, because it was in lieu of a deficiency in real estate, was itself real estate. It appears to me this is an error; according to the evidence there was no land granted in consequence of the deficiency in lot 16 in 1st concession of Dover East, but a certain sum of money. It is true no money was payable, but the sum so granted might be transferred to any other person by the person to whom the allowance was made; and, in fact, very shortly afterwards, namely by 23 Vict. ch. 2 (1860), such compensation is expressly declared to be "treated as personal estate and dealt with accordingly." It evidently, however, was not the intention to treat that deed as any conveyance, it was simply a declaration of what the parties executing it believed to be the right of George Wade Foott, and it must be borne in mind the plaintiff had herself no power to make any conveyance or to interfere in any way with the trust estate.

The 16 Vict. ch. 159, sec. 20 (C. S. C. ch. 22, sec. 24), had enacted that "Wherever, by reason of false survey, any grant, sale, or appropriation of land is found to be deficient, the Governor in Council may order a free grant equal in value to the ascertained deficiency. But no such claim shall be entertained unless application has been made within five years from the discovery of the deficiency, nor unless the deficiency is equal to one-tenth of the whole quantity described as being contained in the particular lot or parcel of land granted."

In the case now before us the deficiency was not discovered until 1856, and amounted to upwards of one-fifth of the quantity. It was not expressly stated to whom the grant for compensation was to be made, whether to the original patentee or to those claiming under him, but it is plain from the order of Council of 12th September, 1856, that the Governor, acting on the opinion of the Attorney-General, was willing to make the compensation either to the trustees or to Foott himself.

Subsequently to this a grant to the extent of 412 acres was issued before the 20th April, 1857, when the then commissioner of Crown lands wrote to the Attorney-General, "a grant has been made in their name (viz., the trustees to whom such grant had been made) of 412 acres in the township of Chatham, in part compensation for such deficiency, and your opinion is requested in regard to the proposition to accept a surrender of the patent from the said trustees and to issue a new patent in favour of Mr. Foott," to which the Attorney-General replied on 21st April, 1857: "I am of opinion that the proposition for the surrender of the patent by the trustees and the issue of a new patent in favour of Mr. Foott can be entertained with propriety."

Unfortunately for the defendants in the suit of *Foott v. Rice et al.*, this suggestion was not acted upon, and the patent was not surrendered. It was after this correspondence and after the parties knew what their rights were in respect to this compensation and before the purchase by the said Foott of the land now in question, that the deed of 4th June, 1857, was executed by James B. Perrier and by the plaintiff and it does appear to me to be inequitable and unjust to allow the contention of this plaintiff to prevail. The right of George Wade Foott to receive the compensation had been acknowledged by the Government and by Perrier and the plaintiff, and he had in consequence become the purchaser of this land, and had by his letter of 13th October, 1857, requested the commissioner to "send on the patent in the name of James Beatty and Albert Prince, Esq., on account of my claim." He gives no instructions whatever that the grant is to be made to them as trustees for his wife, and if the patent had been issued to them as trustees for Mrs. Foott it should in my opinion be directed to be cancelled and a new one issued, but it does not do so, it grants the land to James Beatty and Albert Prince, describing them as trustees, but not to them as trustees.

In my opinion this bill should be dismissed, with costs; and this appeal allowed, with costs.

Appeal dismissed, without costs. [GALT, J., dissenting.]

SCRIBNER V. KINLOCH ET AL.

Sale of goods—Change of possession—R. S. O. ch. 119, sec. 5—Judge or jury, Findings by.

An appeal from the judgment of the Queen's Bench Division in this case, reported 2 O. R. 265, by reason of the Judges of this Court being equally divided in opinion, was dismissed.

Per BURTON, J. A., and GALT, J.—The sale of the debtor's goods was not only accompanied by an immediate and complete delivery, but was followed by an actual and continued change of possession; and was therefore valid as against creditors under R. S. O. ch. 119, sec. 5.

Per PATTERSON, J. A., and ROSE, J.—The actual change which must immediately follow the sale is the same change which must continue; and it could not be said to have been continued where the vendor apparently resumed his place in the shop containing the goods in question, one day after the sale, though in reality as clerk or salesman for the purchaser.

Remarks upon reversing the findings of a Judge or jury upon a question of fact or of mixed law and fact.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division reported 2 O. R. 265, (*sub nomine Scribner v. McLaren et al.*) There were three interpleader issues, which were tried before Osler, J. A., without a jury, and found partly in favor of the plaintiff (the claimant) and partly in favor of the defendants (the execution creditors). On motion to the Divisional Court judgment was ordered to be entered for the plaintiff in all three issues, from which the defendants in two of them appealed.

The appeal was heard on the 8th of June, 1885.*

McCarthy, Q. C., *H. Cameron*, Q. C., *Dougall*, Q. C., and *McPhillips*, for the appellants.

Sidney Smith, Q. C., *J. K. Kerr*, Q. C., and *Holman*, for the respondent.

September 8, 1885. BURTON, J. A.—I do not think any sufficient reason has been given for disturbing the finding of the learned Judge at the trial, confirmed as it has been by the Divisional Court, as to the transaction between the

**Present*—BURTON, PATTERSON, J.J.A., GALT and ROSE, J.J.

plaintiffs and Morton being a *bond fide* sale, or as to there being a complete delivery and transfer of possession to satisfy one portion of the statute. That is to say, that there was such an immediate delivery and change of possession upon the completion of the sale as was sufficient within the terms of the Act; and the only question is, whether there has been such a continuance of that actual change of possession as is also essential to the validity of the transaction as against creditors of the vendor?

Nor do I fancy that any of us will feel at all inclined to dissent from the opinion expressed by the then Chief Justice of the Queen's Bench, (2 O. R. 276,) that where there is a conflict of evidence we should not attach less value to a finding of the Judge upon the facts than to that of a jury.

The further remark of the learned Chief Justice (p. 275) that "I feel very strongly that if a jury properly directed had found either for or against the sufficiency of the change on the evidence before us, the Court would not have disturbed it. The Judge would have explained the law to the jury, and have asked them whether the required change had taken place"—contains a truism in reference to the obvious defects in the system of trial by jury; and there is too much reason, I think, to fear that a miscarriage of justice has not unfrequently occurred from the inability of the Court to grant relief when a wrong verdict has been given, either from the jurors perversely disregarding the Judge's directions or from their inability to apply them to the facts—it being treated almost as a conclusive presumption that the jury understood and properly applied every legal direction given by the Court.

It is not to be regretted that that system no longer exists, except in cases where Judges omit to avail themselves of the change in the law which enables them to obtain from the jury their findings upon the facts and apply the law themselves.

The former defective system is so well described in an article recently published in a non-legal magazine that I cannot forbear making an extract from it: "In most cases,

and in all complicated cases, certain facts affect and qualify others so that the evidence will admit of various theories, and the Judge gives in his charge to the jury the different legal propositions which correspond therewith. The idea that untrained men hearing the testimony for the first time will be able to grasp it as a whole, and to appreciate the logical connection of different portions of it; then to remember a score of hypothetical instructions embodying the modifications and interdependencies of legal principles; and then to apply the intricacies of the latter to the complications of the former, is the wildest of all legal fictions."

But the quotation I have given from the learned Chief Justice's judgment, though bringing into prominence one of the defects of the old system, does not assist us in this inquiry nor lead to any practical result, because, in order to come to a conclusion even in the case suggested whether any relief could be granted, it would be necessary to know how the jury were directed. I made an unsuccessful appeal to Mr. McCarthy to ascertain his views as to the proper direction to be given, or as to the facts which the jury should have been asked specifically to find, in order that the Court could form a conclusion as to whether there had or had not been such an actual and continued possession as the law requires. His reply was, that the jury were the sole parties to say whether there had been a change of possession.

I do not at all dispute that the question is generally and mainly one of fact; but the jury must necessarily be directed whether, if such and such facts are established to their satisfaction, they do or do not in law constitute such an actual and continued change of possession as is contemplated by the statute.

The jury are not to be left at large to construe the words of the Act of Parliament. The learned Judge tried this case without a jury, but from the remark he made, that "though a question of fact, in disposing of it he must be governed by the law as laid down in similar cases," I infer that he would have directed the jury that even if they

found the facts in accordance with the plaintiff's contention, and as he has found them, he must instruct them that as a matter of law there was not such a continued change of possession as the statute intends.

If that would have been a proper direction, then his judgment should stand; but if the test was that which I shall presently mention, and it was open to a jury to find a verdict based upon the fact that a person dealing with Morton could easily have satisfied himself that he was not in possession, but that the possession once taken by the plaintiff still continued openly and visibly with him, then I see no reason for differing from the conclusion at which the Divisional Court has arrived.

The question is one upon the construction of our own statute. The decisions in the cases cited under the English Bankruptcy Act afford but little assistance, and are apt, unless very carefully considered, to be misleading; and the same remarks apply, although not to the same extent, to the English Bills of Sale Act.

If we were allowed to speculate as to the object of the Legislature in passing our Bills of Sale Act, I am not prepared to give much weight to what has been supposed by some Judges to have influenced them, viz.: to give to creditors the means of knowing by the registration of such instruments whether they were trusting a man who had the apparent means of satisfying his engagements. I hardly think the Legislature would have evinced such an anxiety to protect a class usually well able to protect themselves; nor do I think there are many of that class who would be induced to grant credit to a man from the mere circumstance that he is in possession of a stock of goods the price of which might or might not be unpaid, which might be swept away the following day, not by the holder of a secret bill of sale, but by an execution. Creditors or persons proposing to become creditors generally require more tangible proofs of solvency than the mere possession of an unpaid-for stock of goods.

But I think we may, in putting a construction upon a statute, fairly consider what the law was before the passing of the statute, and what was the evil then existing and which it was proposed to remedy.

Those of us who are old enough to remember the state of things existing before the passage of our Bills of Sale and Chattel Mortgage Acts, will remember that when the sheriff went to seize goods of which the execution-debtor was in possession, some one would not unfrequently step forward and say, I have a mortgage or a bill of sale of these goods, given some months ago. Upon that the sheriff was probably instructed to contest the validity of the claimant's title, and then arose a contest as to the bill of sale. The fact that the holder of the bill of sale had allowed the maker of it to remain in possession was some evidence that it was fraudulent, but it was not conclusive evidence. The whole question was one for a jury, and there were long contests, sometimes supported by perjury and sometimes by honest testimony, in order to ascertain whether the thing was a sham or not, and after all it was a game of chance who should succeed.

I think, with great deference, that it was with the view to put a stop to such an unsatisfactory state of things as this that the Legislature stepped in here, as it did in England, and said, we will put an end to these discussions; and unless a purchaser or mortgagee goes into actual possession, and continues in actual possession, or takes and registers a bill of sale, we will declare his claim fraudulent in law;—so that when a sheriff goes to seize, he may safely disregard any claim of the kind, unless the instrument under which the party claims is registered, or the claimant has taken possession; in the same way any person, since the passing of that Act, dealing with and making a purchase from a man who is not the real owner, but is in possession (no bill of sale being registered) is protected, because the bill of sale as to him is fraudulent.

Although the wording of our own and the English Bills of Sale Acts are somewhat different, the object sought by

both appears to me to have been the same; and now that the decision of this Court in *Parkes v. St. George*, 10 A. R. 496, has placed a construction upon the word "creditors," holding that it is confined to creditors who are in a position to seize the property, such as creditors having an execution, I do not see any substantial difference between the two statutes. The bill of sale, though defective for some statutory omission, is good as between the parties and against all the world, except a creditor in a position to seize. If, therefore, the execution creditor finds the real owner in possession, it surely does not lie in his mouth to say: "I have a right to seize your goods, although my execution is against another man, because if I had come whilst he was still in possession you could not have made good your title under your bill of sale." It would have been void against the execution creditor if he had seized whilst the debtor, the apparent owner, was in possession; but as he did not so seize, there is no great hardship in his execution being confined to the debtor's own goods. He is still at liberty to contest the validity of the bill of sale for fraud, but that is another matter.

In both Acts it is intended to do away with a mere formal delivery, and to provide that there shall be both a delivery and an actual and continued change of possession; but if the construction we have placed upon the statute be correct, then there is no one in a position to impeach the bill of sale until the creditor obtains his execution, and till then the mortgagee has a right to perfect his title by taking possession.

The argument about a debtor obtaining a fictitious credit by reason of his possession has a persuasive ring about it, but not in one case out of a hundred has credit been given upon the faith of it, and I have pointed out that unless the intending creditor chooses to obtain a lien upon the goods by mortgage, his fancied security is just as likely to be swept away by an execution as by a secret chattel mortgage. There is nothing in the statute to lead to the inference that it was passed with such an object, whereas

the glaring evil I have referred to was effectually swept away by the enactment; so that even if there be a *bond fide* sale, but a mere formal delivery, the former owner being allowed to resume possession, there would be no question of fact for the jury, but the Court would hold as a matter of law that there was no such change as to satisfy the statute.

Some Judges have, I believe, gone the length of holding that if the execution debtor is retained in the service of the purchaser, that would in law not amount to a sufficient change of possession; but I think Mr. Justice Burns took the more correct view when he laid it down in *McLeod v. Hamilton*, 15 U. C. R. 114, as being a question of fact. He refers to it thus: "His (the debtor's) services may be very material to the plaintiff's interests, and I am not disposed to think that it is incumbent upon a creditor to dismiss the debtor entirely in order that the statute shall be said to be complied with."

Let us suppose a case of a *bond fide* sale to a purchaser who required, as a condition of an engagement with him, that all his employees should wear a uniform, like the conductors of a railway, and that whilst retaining the service of the former owner he required him also to assume it; the new proprietor, remaining in possession, exercising all the rights of owner, having his name substituted over the door for that of the former owner—could it be said that as a matter of law that was not an actual change sufficient to satisfy the statute? It does not differ from the ordinary case in which the services of the former owner are retained, except that the evidence of the character in which he deals with the goods, that is, as the servant of the true owner, the party owning and in possession is more clearly and distinctly shewn; but it serves to shew that in no case where the purchaser is in actual possession, although the former owner may remain on the premises, can it be laid down as a pure matter of law that there has not been an actual change of possession.

If this position be correct, the former owner's dealing with the goods is obviously a question of degree; if the delivery were actual, but not continuous, as for instance, if the purchaser went away, visiting the place occasionally only, it would not satisfy the statute; but I am unable to understand that a change of possession, actually made, is necessarily to be defeated because the former owner remains on the premises in the position of a clerk.

There is no pretence that these defendants were deceived into advancing money upon the faith of the former owner's apparent possession; but as creditors having execution they are, no doubt, entitled to seize, if the fact of Morton's being in the plaintiff's service as clerk is as a matter of law fatal to the transfer. I think, with Mr. Justice Burns, that it is a question of fact, and that the true test would seem to be whether any person going to the premises and exercising ordinary vigilance would conclude the former owner or the purchaser to be in possession of the goods.

If it were clearly established that although it might not be apparent to every one, the person trusting the debtor was fully aware of all the facts at the time he contracted the debt, it may well be questioned whether such a person could avail himself of any omission to register or to take full and exclusive possession.

That such a creditor could not be heard to dispute the fact of a change of possession although the rest of the public knew nothing of it, was held by this Court in the case of *Danford v. Danford*, 8 A. R. 518. If then the evidence establishes that there was an actual change, in fact—that it was notorious in the locality—and that any person with ordinary vigilance could have ascertained that such was the case, and that the plaintiff was upon the premises exercising control and Morton only his clerk, I think it would not be possible for a Court to hold as a matter of law that the change of possession was not sufficient.

The sale and change of ownership were generally known immediately after the sale, which was completed on the 25th August, and it was advertised in the news-

paper published in the village on the 1st September. A new set of books was opened; the plaintiff was about the premises taking control as owner; but on the day after the sale, in consequence of a disagreement with the person who had previously acted as clerk to the former owner, and who was acting in the same capacity with the plaintiff until the disagreement which resulted in his discharge, Morton, the former owner, at the request of the plaintiff, consented temporarily to take the same position.

Here then there was for a short period a full compliance with the requirements of the statute, an actual possession by the vendee. Did that actual possession of the vendee cease, upon the engagement of Morton, to be a sufficient possession within the meaning of the Act of Parliament as a pure matter of law, or was it not a question for a jury whether a person going to the premises and using ordinary vigilance would conclude that Morton, and not his grantee, was in possession.

I asked during the argument whether, if the hiring of Morton had been seven months instead of a few hours after the delivery of possession, it would be contended that the execution creditor must necessarily prevail, and it seemed to be contended that that would be the effect. So that the singular result would follow that although upon an execution issued against Morton on which the sheriff proceeded to seize on the last day of the sixth month the goods of the plaintiff's he would be a trespasser, he would be at liberty to do so on the following day in consequence of the plaintiff having taken Morton into his employment.

I think that can hardly be the true view of the meaning of the statute, which was intended to guard against a mere formal delivery—the vendor or mortgagor taking the property back into his own possession and keeping it and using it as his own, and cannot apply where there has been not a mere formal delivery, but an actual delivery, followed by actual possession.

In such a case the person dealing with Morton might have satisfied himself easily that there had been a change

in the ownership; that the new proprietor was exercising unmistakable acts of control and ownership; that Morton was not, and was not professing to be, in possession, using the property as his own; and if the jury found that these facts were notorious, so that they must have been patent to any one visiting the premises, I think the proper inference would have been that there was such a continued change as the law requires.

I do not think the fact that these execution creditors had notice before they placed their writs in the sheriff's hands can at all affect or restrict their right. The question is, whether there was evidence to shew that the fact of the sale and change of possession was so open and notorious as should have convinced any ordinarily careful person proposing to deal with Morton that there had been such change of ownership, and that the possession was the plaintiff's and not his? Constructive possession, I fully admit, will not do; but if there was evidence of the plaintiff's actual possession and control, then the circumstance that Morton was still on the premises in the character of clerk would not necessarily defeat the plaintiff's title.

The evidence must of course be such as would justify the jury in inferring under the instructions of the Court that there had been such an actual change of possession. All the circumstances referred to in the learned Judge's judgment would have been material in enabling a jury to come to a conclusion as to whether there had been not only a change of ownership, but a visible change of possession. Such a change or such a divesting of the possession of the vendor as any one upon reasonable inquiry would be bound to know and to understand, was the result of a change of ownership.

I think it was fairly open to the tribunal disposing of this case to draw the inference that there had been such a change of possession as to satisfy the statute, and I am not prepared to say that the Divisional Court erred in drawing that inference.

I do not think, when rightly considered, it conflicts at all with any of the decisions which are referred to and distinguished in the judgment ; and I entirely agree with the quotation of my Brother Cameron from the judgment of Pollock, C. B., in *Everhad v. Gough*, 2 H. & C. 1, viz.:

“ If any class of Acts ought to be construed strictly it should be those which, having for their object the prevention of fraud, have in certain cases a tendency to invalidate *bond fide* contracts. Where fraud does not exist, this Act should at all events receive no more than its true construction.”

It is said that the purchaser might, if he wished to retain the services of the former owner, have made his position safe by registering under the statute ; but it is obvious that if the engagement was made weeks or months after the transfer, that this might be impossible. I think, therefore, it would be not only a harsh but a forced construction of the statute to hold that as a matter of law the change of possession was affected by such a hiring.

The former owner's possession was effectually put an end to by the delivery. The fact that he was subsequently engaged as a clerk was an accident—not part of the original understanding or agreement—and did not revest in him the possession of the goods, the title and possession of which still remain in the purchaser (the present plaintiff), as would be apparent to any one making a reasonable inquiry.

I am of opinion, therefore, with the majority of the Court of Queen's Bench, that the case is not brought within the Act, inasmuch as there was not only a complete delivery, but an actual and continued change of possession ; and that the judgment should therefore be affirmed, and this appeal dismissed, with costs.

PATTERSON, J. A.—I think this interpleader issue was properly disposed of at the trial by my brother Osler.

I form no independent opinion on the question of the reality of the sale from Morton to Scribner. That was a

pure question of fact, and no sufficient reason has been advanced for interference with the finding of the Judge who heard the evidence and saw the witnesses.

The sale must be taken to have been a real one and not open to objection under R. S. O. cap. 118, or 13 Eliz., cap. 5. But when we test the validity of the transaction under cap. 119, or the Bills of Sale Act, it seems to me impossible to support it against creditors without disregarding the provisions of that statute.

There was no writing; therefore it was essential that there should be an immediate delivery and an actual and continued change of possession.

The change of possession must be actual, not such a constructive change as may happen and may for all purposes except those of this statute be a real change, when the vendor becomes bailee or servant of the purchaser, his possession which continues in fact becoming in law the possession of the purchaser. I take it that to effect an actual change of possession the goods must pass from the hands of the vendor, whether they are carried away by the buyer, or the seller himself retires.

There was in this case such an actual change. Morton retired, and Scribner assumed actual control to the exclusion of Morton.

But this actual change which must immediately follow the sale is the same change which must continue. This appears to me so plain that to hold otherwise we must add something to the statute, which speaks of a continued change without any qualification touching either its character or its duration.

Therefore when we find that Morton, a day after the sale, resumed his place in the shop, though as clerk or salesman for Scribner, and when we ask if under these circumstances the change of possession continued, the question is to my mind precisely the same as if without any interval after the sale Morton had continued in charge in his new capacity, and we had to decide whether an actual change of possession had taken place.

There is no decision under the statute that would warrant the holding that an actual change of possession could be effected by the alteration in the relationship of the parties, even with the additional circumstance that the purchaser may have been about the premises and may have taken some part in the conduct of the business; and in my opinion the intention as well as the letter of the statute are opposed to such a holding. It may often be of importance to a purchaser of a going concern to retain the services of his vendor; or, in other words, that an actual change of possession shall not take place. In this case it seems to have been so. The arrangement can always be safely made by complying with the simple direction of the statute, making a memorandum in writing and filing it with the prescribed affidavits; but in this case that was not done.

I agree with his Lordship the Chief Justice of Appeal, who was Chief Justice of the Queen's Bench when the judgment now in review was delivered, and who dissented from the majority of the Divisional Court, that the judgment of my brother Osler ought not to have been disturbed.

I do not, however, rest so much as he appears to have done on the circumstance that the absence of continued possession had been found as a fact or a mixed question of law and fact, and upon the reluctance of Courts to interfere with a verdict either of a jury or judge.

I do not understand the finding, so far as it is a finding of fact, to be impugned. The circumstances under which Morton at first retired from the possession and afterwards resumed it, and the nature of his connection with the business, are facts about which there is no dispute, conceding, of course, the *bona fides*, as on this branch of the case it must be assumed.

The question is, to my apprehension, the application of the statute to those facts. That is a question of law, and must of necessity be so treated whether the discussion arises upon a charge to a jury, or, as at present, on a complaint of the decision of a judge.

I had occasion not long ago to deal with a question of change of possession in *Danford v. Danford*, 8 A. R. 518, in which the change of possession was of a different character from that now in question. I now refer to that judgment without repeating my remarks.

In my opinion we should allow the appeal, with costs.

GALT, J.—This is an appeal by the defendants against a judgment of the Queen's Bench Division reversing the decision of Osler, J. A., who tried the case without a jury. The facts of the case are so fully stated in his judgment and in that of Cameron, J., that it is unnecessary to refer to them. It is manifest that the learned Judge at the trial gave his judgment in favor of the defendants very much against his own opinion as respects the facts of the case, simply because he felt himself constrained to do so on the authority of the cases cited by him. With every respect for his opinion, I do not think they were such as to render this obligatory on him; on the contrary, I fully agree with the judgment of Cameron, J., in which Armour, J., concurred. I think, therefore, the appeal should be dismissed, with costs.

As respects the costs incurred in this suit I concur in the opinion of Hagarty, C. J., as to the very unnecessary expense incurred at the trial; but the costs of this appeal are very much more.

On referring to the appeal book it will be found there are no less than 45 pages of copies of exhibits, none of which were disputed at the trial. The original schedule under which the stock of goods was sold to the plaintiff is set out *verbatim*; and all the deeds, about which there was no dispute, are also printed at full length. In my opinion a stop should be put to this very useless expense.

ROSE, J.—I agree that whether there was an actual and continued change of possession is a question of fact. It will be observed that the requirements of the statute are not satisfied by the purchaser going into possession. There

must be something more, *i. e.*, an actual change. The legal change would be effected by a formal delivery, and as between the parties the purchaser might take and remain in possession, although the vendor remained in the store and in apparent possession. But otherwise it seems to me under the statute as against creditors. I agree that the change must be such as would prevent fraudulent dealing with the goods, and so that a stranger would not be led to deal with a person in apparent possession, or who had been in possession as owner, and whose apparent possession had not by unequivocal acts and conduct been put an end to.

What such acts and conduct in each case must be, cannot, I think, be laid down. On each state of facts being presented it will become necessary for the Judge who tries the case without the assistance of a jury, or for the jury under the direction of the Judge, to determine. I venture to think that a direction to the jury cannot be made more full than to say that they must be satisfied that on the facts presented by the evidence there was an actual change of possession from the vendor to the vendee, so that the vendor no longer remained in possession and control of the goods, and so that a stranger who might desire to purchase or otherwise deal with the goods would not be misled by the apparent possession of the vendor into dealing with him as the owner, and that such actual change must have continued. The statute has not defined the time of continuance, and I do not think the Judge at the trial is required to fix the limit. I am not prepared to say that the vendor may not be employed by the vendee. Probably he may be if the change of possession is so evidenced as to leave it free from reasonable doubt that the change is actual and continued.

My learned brother Burton has forcibly illustrated such a state of facts as would evidence such a change. Other acts will readily occur to the mind. If, as in many cases, the whole appearance of a store is changed, the old sign taken down, a new sign put up, the window filled

with hand-bills, the new proprietor takes the actual management, welcomes his customers, directs them to the various departments, gives directions to the clerks, the old proprietor being relegated to a subordinate position, so that one entering the store would readily see that the purchaser was the proprietor and the vendor his employee—in such a case very possibly a Judge or a jury would be able to find an actual, and if it continued, a continued change of possession; and yet, even on such a state of facts, could a Judge direct the jury that as a matter of law there was an actual and continued change of possession? I think not. The learned Chief Justice presiding in the Court below has so fully stated his views on this point, in which I fully concur, that I cannot usefully add anything.

If on such a state of facts as here, such a finding as that of the learned Judge is to be reversed, then it seems to me equally so would be a similar finding, where, say for instance, a merchant on King street in this city, who has carried on business for a quarter of a century, sells out, formally hands over possession, and the next day is found in his old position apparently managing and controlling the business.

I think the finding of the learned Judge at the trial should not have been disturbed, and that the appeal should be allowed, with costs.

The Court being equally divided in opinion the appeal was dismissed, with costs.

MCLEAN V. BREITHAUPT ET AL.

*Stoppage in transitu—Goods warehoused by carrier—Attachment—
Termination of transitus.*

The plaintiff sold to G. a quantity of leather, which was to be sent to the purchaser at P. by railway. The shipping bill contained, amongst others, the following conditions: "In all cases * * the delivery of goods will be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's shed or warehouse, * * when they shall have arrived at the place to be reached upon the railway of the company. The warehousing of them will be at the owner's risk," who was to be liable for any charges for storing them otherwise than in the warehouse of the company. "Storage will be charged on all freight remaining in the depots over forty-eight hours after its arrival."

While the leather remained in the warehouse of the Railway company at P., the purchaser requested the station agent that it might be kept for him by the company until he could find time to remove it, and asked him not to charge storage, but the agent made no promise; and subsequently the sheriff paid the charges thereon, seized the leather under a writ of attachment sued out by the defendants, and removed the same from the stores of the railway company to the shop of G.

Held, that this did not deprive the vendor of his right to stop the goods *in transitu*.

THIS was an appeal from the County Court of Waterloo, in an interpleader issue to try the right of the defendants to seize and sell a quantity of leather, sold and consigned by the plaintiff to one William Gilles, to satisfy a debt of \$518⁵⁸/₁₀₀, due by Gilles to the defendants.

One Ferguson, book-keeper in the plaintiff's employ proved that he had shipped a roll of leather valued at \$167 by the Great Western Railway, on the 17th of August, 1882, to the address of Gilles, at Preston, who absconded without paying therefor; and that he (witness) on going to Preston after notice of the absconding, had found the goods in the hands of the sheriff at Gilles's store, whereupon witness served the sheriff with a notice on behalf of the plaintiff claiming the leather as never having been delivered to Gilles, and offering to pay the sheriff for freight and charges disbursed by him.

On the back of each of the shipping bills was indorsed the following notice:

"10. That in all cases where not otherwise provided, the delivery of goods will be considered complete, and the

responsibilities of the company shall terminate when the goods are placed in the company's shed or warehouse (if there be convenience for receiving the same), when they shall have arrived at the place to be reached upon the railway of this company. The warehousing of them will be at the owner's risk and expense, and if the company be unable to store or warehouse goods received by them, it shall be lawful for them to place them in any warehouse that may be available, at the risk and expense of the owner of the property so stored, and the charges for so storing, warehousing and conveyance shall form an additional lien upon said goods."

" 19. Storage will be charged on all freight remaining in the depot over forty-eight hours after its arrival."

One Jell, agent of the Great Western Railway at Preston, proved that four or five days before Gilles ran away he had been at the station, " and I urged him to remove them with other goods of his, and pay his freight. I told him that if he did not take them away I would have to charge them storage. * * He asked me to allow them to stay for him, and that he would take them away as soon as he could find time. * * The sheriff seized them in my possession. Gilles wished me to keep them, and he wanted to arrange that I should not charge him storage. I did not promise anything."

William Weiler was also examined as a witness, and swore :

" I was at one time in the employment of Gilles. Got these goods at the station, I was in Gilles's employment when he left. I had been with him a year. I worked the second year by the month. He had not discharged me when he left. I got some goods from the station and gave a receipt, September 4th, 1882. I paid the charges. I used Gilles's money. The sheriff instructed me to get all Gilles's goods together, and as these goods were at the station I thought it my duty to get them."

The other facts appear in the judgments.

The Judge of the County Court (Lacourse) who tried the case without a jury, found in favor of the plaintiff on the ground that the plaintiff's right to stop the goods in

transitu had not ceased ; and afterwards, 25th April, 1882, refused to disturb that finding.

Thereupon the defendants appealed, and the appeal came on to be argued before this court on the 26th and 27th of May, 1884.*

Robinson, Q.C., for the appeal. Here the goods had arrived at their destination, and therefore this case is distinguishable from *Smith v. Goss*, 1 Camp. 282, and cases following it.

What took place between Gilles and Jell, the agent of the railway at Preston, and the terms of the shipping bill and advice note, shew that the transitus had ended, and that the Railway Company held the goods as warehousemen. They had reached the place which, as between buyer and seller, was their destination, and were no longer held by the Railway Company for the purpose of carriage. *Dixon v. Baldwin*, 5 East. 175 ; *Valpy v. Gibson*, 4 C. B. 837 ; *Smith v. Hudson*, 6 B. & S. 431 ; *Roger v. The Comptoir d'Escompte de Paris* L. R. 2 P. C. 393 ; *Bird v. Brown*, 4 Ex. 786 ; *Kendall v. Marshall*, 11 Q. B. D. 356.

Gilles intended to take them, and that is a material fact, *James v. Griffin*, 2 M. & W. 623 ; *Bolton v. Lancashire and Yorkshire R. W. Co.*, L. R. 1 C. P. 431. The evidence also clearly shews an assent by Jell to hold the goods for Gilles, which gave Gilles at least constructive possession, and the vendor's right over them was gone : *Whitehead v. Anderson*, 9 M. & W. 518 ; *Cooper v. Bill*, 3 H. & C. 722, 727 ; *Jackson v. Nichol*, 5 Bing. N. C. 508. For that purpose only the assent of the agent to hold the goods for Gilles was requisite, and that was given : *Wiley v. Smith*, 1 A. R. 179, and cases there collected.

If the court, however, should be of opinion that the *transitus* continued after the vendee had absconded, the goods, before the vendor claimed to stop them, had been taken possession of by the sheriff, who had paid the

* *Present.*—HAGARTY, C. J. O., BURTON and MORRISON, JJ. A.

freight and removed them from the railway warehouse to the vendee's shop, which must be deemed to have put an end to the *transitus*, and have thus defeated any right of stoppage by vendor. If that is not considered effectual, then there was such a removal by Weiler, the vendee's servant in charge of his business, and the payment of freight by him out of vendee's money, as would clearly shew that the right of stoppage had ceased. There was no evidence offered so as to bring the case within *Davis v. McWhirter*, 40 U. C. R. 598.

J. K. Kerr, Q. C., and *A. Galt*, for respondent. From *Smith v. Goss*, 1 Camp. 282, down to the latest cases both in England and the United States as well as in this Province all are uniform in holding that until the goods actually reach the possession of the purchaser the right of stoppage continues. Here the facts and circumstances are nearly identical with those in *Davis v. McWhirter*, 40 U. C. R. 598, and fully warrant the finding of the County Judge.

The interest seized by the sheriff was only that of the vendee to obtain a delivery of the goods; until he did so they remained still liable to plaintiff's right of stoppage; and the payment by Weiler of the charges was made simply as the servant or agent of the sheriff.

The carrier's agent, Jell, could not by his mere motion convert himself into a warehouseman for Gilles. It is not shewn that Gilles ever assented to such a change.

In *Stanton v. Edgar*, 16 Pick. 467, the Court decided that goods in the hands of an assignee for the benefit of creditors, were liable to be stopped *in transitu*.

O'Brien v. Norris, 16 Maryd. 122, is a strong case in favor of the plaintiff's right here.

June 26, 1884. BURTON, J. A.—This is an appeal from the County Court of the county of Waterloo, in an interpleader matter, the issue therein (directed to be tried in that court under 44 Vict. ch. 7, O.,) being for the purpose of deciding whether the claimant had the right to stop certain goods sold to one William Gilles, an insolvent, at the time when

the same were seized by the sheriff on an attachment issued by the defendants. The judgment of the court below is in favor of the claimant, and the appeal is against that decision.

The goods were sold by the claimant to Gilles about the 15th of August, and sent by him by the Great Western Railway to the address of the purchaser at Preston, where he resided and carried on business.

The shipping bill contained among others the following conditions: [Here his Lordship read the notices above set forth.]

So that by the terms of the contract between the vendor and the carriers their liability as carriers was to cease on the arrival of the goods at their station at Preston, and the deposit of the goods in the carriers' sheds; and they were to be subject to a charge for storage after forty-eight hours. But that does not affect the vendor's right to stop the goods in the event of the insolvency of the vendee so long as they have not been actually delivered to the vendee.

The result of the authorities is clearly that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser or of some one who receives them in the character of his servant or agent. That, as laid down in *Ex parte Rosevear Clay Co.*, 11 Ch. D., 560, and referred to in *Kendall v. Marshall*, 11 Q. B. D. 356, is the cardinal principle. In order that the vendor should have lost that right, the goods must be in the hands of the purchaser or of some one who can be treated as his servant or agent, and not in the hands of a mere intermediary.

It is true that the judgment of Mathew, J., in that case, was reversed in Appeal, but it was on the ground that the goods had actually come into the possession of the agent of the consignee, who received his instructions from the consignee as to their further destination. But the decision does not in the slightest degree militate against the general principle, that they are deemed *in transitu* not only while they remain in the possession of the carriers, but also

when they are in any place of deposit connected with the transmission and delivery of them, having been there deposited by the person who is carrying them for the purpose of transmission and delivery until they arrive at the actual possession of the consignee, or at the possession of his agent, who is to hold them at his disposal and to deal with them accordingly.

In that case the goods had been delivered to the agents of the consignee, to remain with them if no fresh impulse should be given to them by the purchaser.

The transit had come to an end when the goods reached the hands of the agent, and the Court place their judgment on the fact that there had been a delivery to the agents of the consignee to remain with them subject to his order.

No doubt if the carriers choose to enter into a new contract with the vendee distinct from the original contract for carriage, to hold the goods for the purchaser as his agent in a new character for the purpose of custody on his account, the *transitus* would be at an end and the goods would be constructively in the possession of the purchaser.

But, putting aside for the moment the power of the station agent to make such a contract on the part of the company, of which there is no evidence, it must be clearly established that both parties assented to the new agreement. It is not sufficient to shew that one of the parties was willing to alter the existing arrangement. The carrier cannot of his own will convert himself into a warehouseman for the purchaser so as to terminate the *transitus*, nor can the latter change the capacity in which the carrier holds possession without his assent: *James v. Griffin*, 2 M. & W. 623; *Jackson v. Nichol*, 5 Bing. N. C. 508. A mere promise by the carrier to the purchaser, who has come to demand them, that he will deliver the goods to him so soon as they can be got at, is not enough to bring them into the possession actual or constructive of the purchaser: *Coventry v. Gladstone*, L. R. 6 Eq. 44.

Now what occurred here? The goods, by the terms of the contract, would be liable to charges for rent if not removed within a certain time after notice; but so long as they were not actually delivered to the purchaser or a new agreement made by the carriers to hold them for him they would still be liable to the vendor's lien. What then took place? The purchaser is notified and informed that if any of the goods remain they will be subject to charges which they would be without any new contract. The purchaser says he is not ready to receive them, but expresses a hope that the carriers will not enforce the charges, and the agent makes no promise.

How can that by any stretch of ingenuity be construed into a new contract to hold for the purchaser, and how was the vendor to be affected by what occurred? He would if he had then come have found the goods in the hands of the middleman in his original character of a forwarding agent, and would have been entitled to stop them; *Heinekey v. Earle*, 8 E. B. & E. 410. *A fortiori* where the purchaser declines to receive the goods: *Bolton v. Lancashire and Yorkshire R. W. Co.* L. R. 1 C. P. 431.

The assignee of an insolvent purchaser stands in the same position as the purchaser, and could therefore by taking possession defeat the vendor's right; but I should have thought it clear, apart from authority, that a person coming with an attachment could not by seizure defeat the vendor's lien, inasmuch as he seizes only the interest of the vendee in the goods, and so I am not surprised to find so able a commercial lawyer as Lord Ellenborough observing in *Smith v. Goss*, 1 Camp. 282. "The vendor's power of intercepting the goods was the elder and preferable lien, and not superseded by the attachment, any more than it would have been by the general right of a common carrier to retain all his customer's goods for his general balance."

It is not necessary to inquire what would have been the position of the vendor had he postponed the enforcement of his right until after the sheriff had sold. It is sufficient to say that in this case no such question is presented; the goods had never reached the possession of the purchaser actually or presumptively.

The case of *Smith v. Goss* has been acquiesced in for over three quarters of a century, and is cited with approval in all text books, and the reasoning on which it is founded has been adopted in the United States.

It was upon this principle that a very eminent judge, the late Chief Justice Shaw, of Massachusetts, held that an assignee for the benefit of creditors took only such title as the assignor had and no more: *Stanton v. Edgar*, 16 Pick. 467. That is a title to the goods subject to the right of the vendor to stop them *in transitu*, and which is consistent with the settled doctrine in England, that a third party can acquire no better right to the goods than the consignee himself possessed unless he have an assignment of the bill of lading. See *Oppenheim v. Russell*, 3 B. & P. 42.

In one case in the United States I find the doctrine has been extended still further, and it has been held that even a sale *in invitum* under the attachment did not defeat the right of the vendor, who was accordingly allowed to recover the proceeds of the sale: *O'Brien v. Norris*, 16 Md. 122. As I have already intimated, that point is not before us, and it is unnecessary to express any opinion upon it.

I think the learned judge in the court below was right upon both points, and that we ought to dismiss the appeal, with costs.

HAGARTY, C. J. O.—I agree in the result arrived at by my brother Burton, after some hesitation caused by the rather uncertain language used in some of the cases.

I think we cannot hold the *transitus* at an end so as to defeat the vendor's right. It is well put in *Ex parte Cooper*, 11 Ch. D., 68, that the carrier cannot alter his position from that of a mere carrier and undertake to hold the cargo for the consignee. Unless something equivalent to an attornment is shewn on the carrier's part so that he has altered his position and holds the goods in another capacity, the *transitus* is not at an end. James, L. J., puts it shortly that there must be such a change as makes the carrier or warehouseman the agent of the vendee.

Lord Blackburn appears to hold a like view in *Kemp v. Falk*, 7 App. Cas. at p. 584, and there are cases where it was unsuccessfully tried to shew the transit at an end by proving that the vendee went to the ship on its arrival and told the captain to hold the goods for him for a brief time, to which the latter assented or did not object.

I do not think that what is proved to have taken place here between the vendee and the station master satisfies the requirements of the law so as to exclude the vendor's right to stop.

We are told that if the goods be sold by the consignee before the *transitus* is at an end, that the vendor has an equitable claim on any unpaid portion of the purchase money as against the sub-vendee: *Ex parte Falk*, 14 Ch. D. 446; *Ex parte Golding*, 13 Ch. D. 628. But see Lord Selborne's doubt on this, at p. 578 in *Kemp v. Falk*, 7 App. Cas.

The late Sir George Jessel points out in *Merchants' Banking Co. v. Phoenix Bessemer Co.*, 5 Ch. D. at p. 220, how unsatisfactory and difficult to be reconciled are the authorities on this branch of the law.

The remaining question is as to the seizure and removal of the goods by the sheriff on an attachment against the vendee. The goods arrived at Preston on the 19th August, the sheriff seized on the 4th September. Three days after the goods were demanded by the vendor from the sheriff.

The high authority of Lord Ellenborough in *Smith v. Goss*, 1 Camp. 282, tells us that the vendor's title takes precedence as elder and preferable to a foreign attachment, and that trover would lie to recover their value against defendant who held under the attachment. They were attached in London on their transit to Newcastle.

The question is mentioned but not decided in *Oppenheim v. Russell*, three or four years earlier than *Smith v. Goss*, where Lord Alvanley says: "Whether the sheriff (on a *fi. fa.*) can make them absolutely the goods of the consignee by stopping them before they come to his hands, appears to me very doubtful. At any rate that is not the present case."

Chambre, J., says that he has little doubt but that a consignee may intercept the goods in their passage and take actual delivery from the carrier before the goods get to the end of their journey, and before the vendor has exercised the right of stoppage *in transitu*, "and I will not say but that his creditors in the case of an execution against him for his goods may not do the same thing. No authorities, however, are cited to prove that they may."

Smith v. Goss is cited as the rule in *Houston on Stoppage in Transitu*, 137 (1866).

The law seems similarly stated in *Parsons on Contracts*, p. 260, 7th ed., 1883.

In the case before us no authorities are given to us. I think Lord Ellenborough's decision would have been the same had the goods been seized at their final point of destination, Newcastle, as they were in London.

I am not wholly free from doubt on this latter point, but think I must hold in favor of the unpaid vendor who made his claim without any unreasonable delay.

It may be well to notice the marked difference between the effect of an attachment against an absconding debtor and an execution in judgment.

MORRISON, J. A.. concurred.

Appeal dismissed, with costs.

WEST V. THE CORPORATION OF THE VILLAGE OF PARKDALE.

CARROLL ET AL. V. THE CORPORATION OF THE VILLAGE
OF PARKDALE.

Municipal corporations—Principal and agent—Railway companies—Ultra Vires.

By a special act of the legislature of Ontario, 45 Vict. ch. 45, provision was made for the construction of a subway or subways as a means of crossing certain railways entering the City of Toronto, part of which had to be constructed within the city, and part within the adjoining municipality of the Village of Parkdale, and in consequence of a disagreement between the city and the village as to the terms upon which the undertaking should be proceeded with, the latter united with the railway companies in obtaining an Order in Council under the Dominion Act, 46 Vict. ch. 24, authorizing the companies to execute the work, and the latter entered into an agreement with the village authorities that they should construct the same, which they proceeded to do. In an action against the village brought by the holders of property in the city and village, which was greatly damaged by the mode of executing the work.

Held, [reversing the judgment of the Court below.—HAGARTY, C. J. O., dissenting,] that the municipality was not answerable for any damage caused by the works.

Per HAGARTY, C. J. O.—The defendants could not legally undertake the work merely as the agent of the railway companies, and can only be treated as principals; the plaintiffs are entitled to a reference as to the compensation to be awarded to them.

Per BURTON, J. A.—When the council of a corporation professing to act under the authority of the corporation does acts which are injurious to others, if the objects and purposes which they propose to accomplish are not within the scope of the corporate duty imposed on it by law, the corporation is not liable. What the corporation attempted to do here was not to put in force any of the corporate powers of the municipal body, but the powers supposed to be possessed by the railway companies, and for this reason they are not liable.

Per OSLER, J. A.—If the defendants could act as agent of the railway companies they can defend themselves just as an individual could do under the authority of the railway act and Order in Council; if they could not so act it is equally open to them to defend themselves from liability as a corporation, and either way the plaintiffs fail.

THIS was an appeal by the defendants from the judgment of the Chancery Division, affirming the judgment of Wilson, C. J., which are reported in 8 O. R. 59, and 7 O. R. 270, respectively, where and in the present judgments the facts giving rise to the actions and points raised by counsel are fully and clearly set forth.

The appeal came on to be heard on the 29th of April, 1885.*

Present.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER. J. J. A.

McCarthy, Q. C., and *J. H. Macdonald*, for the appellants.

S. H. Blake, Q. C., *Lash*, Q. C., and *Snelling*, for the respondents.

June 23, 1885. HAGARTY, C. J. O.—I understood on the argument that counsel hardly, if at all, pressed upon the court that this work was done under the Ont. Stat. 46 Vict. ch. 45.

A perusal of the act convinces me that there was no attempt to act under its provisions. Sections 3 and 4 specially point to an agreement to be made between Parkdale and Toronto as to the proportion of cost and compensation for damages and future maintenance, and this was to be done before letting any contract or entering upon the construction of the work, and then follows express provision for compensation to persons for property injuriously affected.

We may refer to it, however, as providing a plain, intelligible course for this municipality to have pursued under the special authority conferred on it to do this particular work, and providing for the very case of compensation here claimed.

On the 24th November, 1883, the committee of the Privy Council reported that the public safety required that the four named railway companies should be required to carry Queen street under their several railways by means of a bridge and subway, &c.

On the same day an agreement is made between the four railway companies and the corporation of Parkdale, agreeing that the subway should be made. That the village, at the request of the railways, but without varying and without prejudice to the legal position of any of the parties, shall take the control of the work with power to let contracts and compel the carrying out of the same; work to be done under direction of Joseph Hobson or other engineer to be agreed on, and failing agreement the work to be executed to the satisfaction

of the inspector or engineer appointed by the railway committees. Each of the railways and the village shall pay \$7,000 into the bank, in all \$35,000: each party to pay one-fifth of any extra cost. Money to be paid on cheque of the reeve of Parkdale on engineer's certificate. * *

The fact of the village having control of the work shall be without prejudice to the legal position of any of the parties.

A by-law of Parkdale finally passed December 3, 1883, recited that it was for the interest of the village that the subway should be made, reciting the order of the Privy Council, and that it had been agreed that Parkdale should bear one-fifth of the cost of constructing the subway and contribute \$1,500 for the iron girders, and that the cost and incidental expenses would not exceed \$10,000, and that it was necessary to borrow the money on debentures, &c.

It was enacted that the agreement should be ratified and confirmed; then that the debentures should be issued and a vote of the ratepayers be taken on a named day, &c.

The vote was in favor of the by-law, and it was formally passed December 3rd, 1883.

On the 27th November, 1883, the village made a contract under their corporate seal with Godson for the construction of the subway, directly between the village and Godson, according to the specifications at prices named in the tender.

That the contractor should not be liable for any damages sustained or claimed by proprietors of adjoining properties or other persons in consequence of the execution of works, &c.:

That the "Engineer" meant Joseph Hobson as consulting, and Edward Stokes as resident engineer, or such other as might be appointed by the corporation.

That all materials supplied should become the property of the corporation when brought on the ground.

On the 26th November, 1883, (the day before the date of

this work, lying half in Parkdale and half in another municipality, as falling within the provisions in the act as to highways.

It is not a work for the alteration or improvement of the highway as such, but a large peculiar undertaking to enable a number of railways to pass over such highway without endangering the public safety.

It seems to me that as to Carroll—whose property is in Parkdale—he has only to deal with his own municipal council, as the parties executing this work, and that his redress must be sought against them or their contractor, Godson.

No trespass has been committed on his land, but the highway from which he had ingress and egress bounding his land has been obstructed or interfered with by the defendants, so, as (he claims), to make it practically useless to him.

Under our old system an action on the case would be brought against anyone unlawfully barring a man's access to the highway along his land, or specially obstructing his lawful use of it.

I presume unlawfully lowering its level so that access, except by a ladder would be impossible, from his land to the roadway would be an actionable wrong.

I think he had a right to come as he did with reasonable promptness to ask the Court to restrain the prosecution of the work.

I am not satisfied that any ratepayer of Parkdale might not also have had a like equity.

The Privy Council did not assume to order the municipality to do any of the work required for the protection of the public; with the railways alone did they assume to deal.

Parkdale had the special sanction of the Ontario legislature to join with Toronto—the other municipality interested—and the railway companies to have this work done; and before doing it to arrange with Toronto as to compensation for damages to landowners injuriously affected.

They pointedly refuse to act under the intelligible provisions of the statute, and take a line of their own, in my judgment, not lawfully open to them.

The very nature of the work running into Toronto, and thus partly out of their jurisdiction, ought, I think, to have convinced them of the necessity of acting under the statute. I think the plaintiff was entitled to ask for the injunction against their prosecuting the work until they had placed themselves in a lawful position.

I understand that in the court below the two cases were argued as on precisely the same footing, no distinction being attempted to be made between the Parkdale and Toronto plaintiffs, and that it was understood that the work was to go on, and if the defendants were ultimately held liable, it would be a proper case for compensation by reference.

The reasons of appeal raise no question as to one of the parties being in Toronto.

As I think the defendants could and might have been stopped, but that was not insisted on, and the work was allowed to proceed, I agree that it is a case for reference as to the compensation to be awarded to plaintiffs.

On their behalf Mr. Blake, on the argument, consented that the reference might be directed as to the entire damage done to the properties, so as to meet the objection that damages would otherwise be claimable *de die in diem*.

I do not think that Parkdale is in a position to urge that as their doing the work was *ultra vires* the purposes of their incorporation, they are not liable.

After the course taken by the council and the adoption of the by-law by the ratepayers, declaring it to be in the interest of the village that this subway should be erected, and that Parkdale should bear one-fifth of the whole cost, and considering that an act had been passed specially authorizing the execution of this work on certain prescribed conditions, I am not prepared to accede to the argument that the municipality as such is not bound to compensate.

We need not here discuss whether the ratepayers may

or not have any redress against the individuals who may have led them into difficulties.

I do not suggest that they have, nor do I think it an answer on the defendants' part that they cannot restore the highway to its original state and thus prevent further injury to plaintiffs.

If the plaintiffs were entitled, as I think they were, to have the defendants and their contractor or servants enjoined from proceeding with the work to plaintiffs' detriment, if they persevere in the work and cannot undo it, I see no remedy but compensation in damages.

The whole question is full of difficulties, but they seem to me to be all of the defendants' own creation, and I cannot think the law so defective as to leave the plaintiffs without remedy against the parties who directly caused the injury, and to leave them to a very doubtful remedy against the railway companies.

I think the appeal should be dismissed, and the decree below affirmed, with the variance that the compensation to be awarded shall be final, as agreed to by the plaintiffs' counsel.

BURTON, J. A.—The case was launched upon the assumption that the city of Toronto and the village of Parkdale were proceeding under the Ontario statute 46 Vict. ch. 45, but were acting illegally, inasmuch as they had not previously to the commencement of the work passed the necessary by-laws to enable the persons whose lands were injuriously affected to enforce an arbitration for compensation, and claiming therefore to enjoin them from proceeding with the works and for damages for the injury already sustained.

The defendants gave to the statement of claim, as thus framed, a general denial, and it appeared very clearly on the plaintiffs' opening that the defendants were not proceeding under the statute, and the learned judge who tried the case, and the Divisional Court, have all agreed that the works were done, or assumed to be done, by the authority

of the railway companies, under the compulsion of an Order in Council of the Railway Committee of the Privy Council, and the pleadings were amended in order to raise the question thus presented.

In the amended claim the contention of the plaintiffs is thus stated :

(8 *c.*) The plaintiffs allege that the true effect of the said agreement between the railway companies and the village of Parkdale, and of the contract entered into by them for the construction of said subway, is, that the said subway is being constructed by the last-named defendants, and not by the railway companies; and that the said defendants are liable to the plaintiffs for the injuries and wrongs complained of.

(8 *d.*) The plaintiffs further allege that even if the said Railway Committee required or authorized the construction of said subway, which the plaintiffs deny, that said Committee has no power to do so; and that even if so required and authorized, the said railway companies did not take the necessary steps, under the statutes in that behalf, prior to the commencement of the work, and did not file in the proper office in that behalf the necessary plans and book of reference; and the plaintiffs submit that the said defendants, Parkdale, cannot shield themselves from their responsibility in the premises by any order or requirements of the said Railway Committee, or by any rights which may be possessed by the said railway companies.

(8 *e.*) The plaintiffs submit that the only authority under which the defendants, Parkdale, can legally construct said subway is the statute of Ontario above referred to; and if it should be held by this Honorable Court that the defendants are authorized by said statute to construct the same, and that their action in the premises is legal, and the plaintiffs are entitled to compensation, to be fixed by arbitration pursuant to the provisions of the municipal acts, the plaintiffs submit that the defendants, Parkdale, should be ordered to pass the necessary by-laws and take the proceedings connected with such arbitration,

the plaintiffs offering, on their part, to take such proceedings.

(11 a.) The plaintiffs claim a mandamus ordering the defendants, Parkdale, to proceed to arbitration in the event above referred to in clause 8 e.

(11 b.) The plaintiffs claim such further and other relief as the nature of the case may require.

The claim of the plaintiffs, therefore, treats the village of Parkdale as *tort feasors*, and claims as a further but somewhat inconsistent measure of relief that they should be compelled under the Ontario statute to pass a by-law and seeks a mandamus to compel them to proceed to arbitration.

The Divisional Court have held the defendants liable as trespassers and that the plaintiffs are entitled to recover damages for the wrongful acts complained of, the learned Chancellor holding, as I understand the judgment, that a municipal corporation, being incorporated for certain specified objects, cannot act as the representatives of the railway companies whose powers are also of a limited character, and also that whatever rights the railway companies might possess under the railway act or the order in Council they had no power to delegate them to a municipal body.

My brother Proudfoot proceeds on the same ground, but he seems to question the position that to make the corporation liable for the acts of its governing body it must be for something within the scope of its authority, and refers to several cases against railway corporations as deciding that the corporations were there made liable as trespassers for acts which could scarcely be considered as within the scope of any authority for which they were incorporated, but I think it will be found, on reference to the cases cited, that the trespasses for which the companies were made liable were acts committed by their servants for the benefit of the company in the management of the business of the company, for which they were incorporated. Such are *Eastern Counties Railway v. Broom*, 6 Ex. 314; *Edward v. The Midland R. W. Co.*, 6 Q. B. D.

287, and in the other case of *Whitfield v. S. E. Railway*, E. B. & E. 115, the question came up upon demurrer, the effect of the demurrer being to admit that if a corporation could by possibility be guilty of publishing a malicious libel they were, and counsel were driven, as it is put by one of the judges, to contend that if the whole of the shareholders had met and unanimously ordered, under seal if necessary, that matters injurious to a rival in trade should be published in order to injure him, no action would lie. See, however, such cases as *Allen v. The London & South-Western R. W. Co.*, L. R. 6 Q. B. 65; *Poulton v. The London & South-Western R. W. Co.*, L. R. 2 Q. B. 534; *Edwards v. London & North-Western R. W. Co.*, L. R. 5 C. P. 445, in which the defendants were not liable, because the acts done were not within the scope of the authority of the agent.

But my brother Proudfoot concurs in holding the municipality liable, for he says: "Assuming it to be necessary to shew the act to be within the scope of their authority, it is shewn here, for by taking the proper steps under the special Act they might have executed the work in question; not having done so, they are trespassers, but within the scope of their authority, and are therefore liable."

I do not propose to discuss the question of whether the village of Parkdale alone had the power under the special act of Ontario to do the work. It is sufficient for the purpose of the present case to say that it was not acting under that authority, and there was nothing in the act rendering it compulsory for the village to act upon it.

The corporation do not claim the benefit of that statute, and it cannot be forced upon them; if therefore they were not warranted in acting as the agents of the railways they were assuming to do something in this case which was wholly outside of their powers.

If the council had actually passed a by-law under their general powers as a municipal body authorizing the doing of the work in question, the property affected and the work done being both beyond the territorial limits of the

municipality, I cannot see how any action would have been maintainable against the corporation.

The council here were not professing to act under the recent statute; rightly or wrongly they believed that they had no power to invoke its aid unless the city of Toronto united with them. What they intended to do was to act as the agents of the railways in carrying into effect the powers they were supposed to have under the railway act, and which they were ordered to exercise under the Order in Council.

There can be no room for any difference of opinion as to the responsibility of a municipal corporation where such corporation is exercising powers conferred upon it, or in the performance of duties required of it by law and its servants or agents perform these duties negligently so as to cause damage to others; but where the council of a corporation professing to act under the authority of the corporation, does acts which are injurious to others, if the objects and purposes which they propose to accomplish are not within the scope of the corporate duty imposed upon it by law, the corporation is not liable.

Were it otherwise, as remarked by Chief Justice Shaw, in an American case, municipal corporations might be rendered responsible upon implied liabilities in cases where they could not bind themselves as a corporation by an express vote of the inhabitants.

The learned judges below, however, seemed to hold that as there was an act of parliament under which they might have placed themselves in a position legally to do these works, they must be held liable. I must respectfully dissent from that view of the law, even if I felt clearer than I do at present, that the council of Parkdale could alone and without the city of Toronto bring into operation the powers conferred upon them by the special act.

If the council could not act as the agents of the railway companies, it may be that the persons actually doing the work would be left without any justification, but it does

not to my mind follow that the ratepayers could be made responsible for the acts of the council in such a case, although they are the representatives of the ratepayers and authorized to act for them in matters within their jurisdiction.

If the ratepayers could not by a unanimous vote have authorized the act, it is difficult to see how they could be made responsible for an act done by the council, not in the exercise of its powers, but as the agents of the railway companies.

This would, I think, be sufficient to dispose of West's case, whose property and the acts of which he complains were both without the territorial limits of the municipality of Parkdale; but as in the other case, Carroll against the same defendants, the property injuriously affected lies within the limits of the municipality, I will deal with the whole question in this case.

It is urged that the municipal body had a general power to lower the grade of that portion of the street lying within its limits, and that as they might, after taking the proper steps, have exercised this power, the act actually done cannot be treated as altogether *ultra vires*.

It may be that if the council authorized the lowering of the grade of a street otherwise than by by-law, the municipal corporation might be left without any justification, as they have no power to do the act complained of under the general law, but may be authorized to do so by a by-law duly passed for the purpose; the person actually doing the work and the members of the council would be liable, and probably without any means of procuring reimbursement from the corporation, but I think the answer is that the governing body did not assume to authorize the lowering of the grade of the street. What they did assume to do was to undertake the letting out and superintending the construction of a subway, one entire work partly within and partly without their limits, as the agents of the railway companies.

Their agreement with the railway companies shews that

it was simply in the exercise or in aid of the exercise of the powers of the railway companies that they agreed to have anything to do with it. It may be that this was, as the court below has held, an excess of the powers of the council, but in so acting they were not the agents of the corporation. They agreed to act as the agents of the railways, and if the railways had no power to do the acts the court could have restrained them by injunction, but I am unable to discover upon what principle the corporation can be made liable as trespassers. If an action had been brought against Godson, as at present advised, I do not see why he could not justify under the railway companies. It may be that he might find a difficulty in enforcing payment against the corporation of Parkdale, that is quite possible, but I do not see how that precludes him from shewing that he is acting in privity with the railway companies and is thus justified in doing the act complained of, if the railway companies could themselves justify. If that be so, it would be a strange state of things that the village corporation should be made liable as trespassers when the person actually doing the work is not. What the council attempted to do here was not to put in force any of the corporate powers of the municipal body, but the powers supposed to be possessed by the railway companies. It was in order to carry these powers into effect that they authorised Godson to do the work. It is for this reason, I think, the corporation is not liable. The governing body was not their agent for any such purpose.

If the railway companies had no power to do the work that would be a different question, and one which, unless it became absolutely necessary, we should scarcely care to consider in the absence of the railway companies, who are not parties to this action. The question raised in the reasons against the appeal, that the Act of 1884 was *ultra vires*, was not argued; and the objection to the form of the order, and the inapplicability of the statute to this case because more than one railway is concerned, does not appear to me to be tenable.

I do not agree, if that be material, that there was no such order as the statute contemplated from the mere circumstance that it takes the form of the recommendation of the committee adopted by the Privy Council and sanctioned by the Governor-General. That appears to be the usual course. The practice was a good deal discussed before the Judicial Committee in the Boundary Case, where it was shewn that that was the mode adopted in this country, although it seemed to be new to their Lordships, who were, of course, conversant with the English practice; but in truth the powers of the companies depend upon the several acts under which they were chartered, and the order merely compels them to do what they had presumably the power to do without.

As no land was compulsorily taken, I do not see how the question of the non-conformity with the requirements of the railway act, raised by the tenth reason against the appeal, arises.

The railway companies are not parties, and I do not understand how anything would be gained by making them parties to these suits, and it might lead to difficulties hereafter. Granting that they can be compelled to make compensation, it is not easy to see how that question could be raised here. The plaintiff is treating the act as an actionable wrong. In order to place himself in a position to obtain a mandamus he should, on the contrary, treat the act as legal and make a demand for compensation before taking proceedings.

On the whole, we must, I think, hold that these actions are not maintainable against the municipality, and that the appeals must be allowed, and the actions dismissed, with costs.

PATTERSON, J.A.—[The learned judge first stated the effect of the pleadings as originally framed and amended and the provisions of the Ontario Statute, 46 Vict. ch. 45, and then continued :]

The Courts below, that is to say, Chief Justice Wilson

at the trial and the Divisional Court of the Chancery Division, concurred in the opinion that the work could not be held to have been done under the Ontario Statute. I have no doubt of the correctness of that conclusion.

The action was brought, as is apparent from the original statement of complaint, with the idea that the defendant municipality would require to resort to that statute for protection. Had that been so, the plaintiffs would clearly have been entitled to the injunction upon the ground advanced by them, that the arrangement between the two councils which was to be preliminary to any commencement of work had not been made. The third section of the statute, which enjoins the preliminary adjustment of the proportions of expense, &c., might be argued to be directory in its character, and perhaps an argument of that kind would have much weight if the question was the validity of something done without objection; but here the objection was made *in limine* by the bringing of the action to prevent the proceeding with the work.

The real questions arise under the amended defence, which may shortly be stated to be that the village corporation merely undertook to carry out, on behalf and as agent of the railway companies, work which those companies were authorized by law to do, and to the expense of which they and the corporation contributed in equal shares.

The plaintiffs strongly contest this position, contending that Parkdale did the work as principal and not as agent.

I think the defence is established by the evidence. We express the same thing whether we speak of the street being carried under the railway by means of a bridge, which is the language of the Consolidated Railway Act, 1879, sec. 48 (D.), following 20 Vict., ch. 12, sec. 11, or whether we say that the railway is carried over the street by means of a bridge, which is the form of words in which, in all our railway clauses acts from 14 & 15 Vict. ch. 51, sec. 12, down to the Dominion Statute of 1879, 42 Vict., ch. 9, sec. 15, this power is spoken of, and the subway in question is

in fact the carrying of the railways over the street by a bridge, and is a work which any one of the four railway companies had power to do.

The powers of the Grand Trunk Company are found in 14 & 15 Vict. ch. 51, incorporated with its special act 16 Vict. ch. 37; the same powers, as repeated in C. S. Can. ch. 66, apply to the Toronto, Grey, and Bruce, and the Credit Valley Companies by virtue of their special acts, 31 Vict. ch. 40, and 34 Vict. ch. 38. The Northern Railway company possesses the same powers under the railway act of 1868, (D.) certain clauses of which are incorporated with its present special Act 38 Vict. ch. 65, (D.) and previously to the passing of that act, it had as ample powers under the statute 12 Vict. ch. 196, which incorporated the Toronto, Simcoe, and Lake Huron Union Railroad Company.

The 48th section of the act of 1879, gave to the Railway Committee of the Privy Council the power which under C. S. Can. ch. 66, sec. 141, was vested in the Board of Railway Commissioners, and under 37 Vict. ch. 36 sec. 1, (O.,) in the Commissioner of Public Works, to require the railway companies to construct the subway, or as it is expressed to carry the street under the railway; but that section conferred no new power upon the companies and did not relieve them from any liability which they would have incurred by voluntarily doing the work.

Section 48 was amended in 1883, by 46 Vict. ch. 4, sec. 4, (D.) which act was passed before the making of the order in Council now in question, but the amendment did not vary the section in any particular which concerns us at present. It required a plan and profile to be submitted to the Committee, and to this some allusion was made in the argument: the fact being formally admitted at the trial that no plan or profile had been furnished. It is evident that the requirement is directory only; that its object is the information of the Committee, who may proceed without it, and that the omission to furnish it cannot affect the

powers or the liability of the company. See *Norvell v. The Mayor, &c., of Worcester*, 9 Ex. 457.

The section was further amended in 1884, by 47 Vict. ch. 11, sec. 3, (D.) but that was after the transactions in question, and even if earlier would not have altered the position.

What we have then is an Order in Council, made on the 24th November, 1883, purporting to authorise and require the four railway companies to carry Queen street under their several railways by means of a bridge or bridges and subway, with the necessary approaches thereto on Queen street from the east and west, and on Dufferin street from the south, and to execute all the works requisite therefor.

Assuming the jurisdiction of the Privy Council over all four railways, although the Toronto, Grey, and Bruce Railway seems not to have been declared to be a work for the general advantage of Canada, until some months after the date of the order (47 Vict. ch. 66, sec. 20, D.), I understand the operation of the order to be to set the companies in motion to do what they might of themselves have legally decided to do.

The report on which the order was made recites that the village of Parkdale at the request of the railway companies, had undertaken the control of the works as stated in a memorandum read before the committee, and duly filed of record.

By that memorandum the four companies and the village were each to pay one-fifth of the cost, and the village council was to undertake the control of the works.

Now, I have not been able to see in what way the work ceased to be the work of the railway companies undertaken under the powers contained in their charters, and executed just as they might have executed it when they first built their roads, or at any time afterwards, although now instigated to do it by the coercive order in Council.

The work was actually done, and the damage to the plaintiffs was actually done or begun by Godson, the contractor. It would, I apprehend, be a sufficient justifi-

cation for him that he did it at the request of the railway companies and in the exercise of their powers, that request being conveyed by the medium of his contract with Parkdale.

The construction of the subway was undoubtedly a matter of importance to the village of Parkdale, just as the building of a bridge over a stream which separates one municipality from another may be of very great consequence to the prosperity of one or both municipalities.

Whether a municipal corporation necessarily exceeds its powers by undertaking so essential a work, when part of it must be done outside of its own limits, is a matter upon which I do not at present feel called upon to express an opinion; nor do I consider whether the case would be altered by the circumstance that the work was done at the expense or partly at the expense, but wholly under the powers, of the railway companies; because if it is conceded, for the sake of the argument, that in making the contract under the circumstances, the village corporation was not acting strictly within its powers, I do not see how the plaintiff is hurt by that circumstance, or how it affects to his prejudice any remedy he may have against the railway companies.

We cannot, of course, decide whether or not the companies are liable, because they are not before us.

If they are liable to make compensation for injuriously affecting the plaintiffs' lands, as in *Regina v. Buffalo and Lake Huron R. W. Co.*, 23 U. C. R. 208, the plaintiffs may yet be indemnified. If it should turn out that the companies, while invested with legal power, and even subject to a statutory obligation to do the work by which the injury is caused, are yet free from liability to make compensation, there may be reason to complain of an oversight in the legislation, but that will not transfer the liability from the companies to the municipality.

Two very late cases on this subject may be noted, although they do not add materially to what we learn

from earlier ones; *Wadham v. North-Eastern R. W. Co.*, 14 Q. B. D. 747, and *The Queen v. Essex*, 14 Q. B. D. 753.

Care was taken in the agreement to avoid misapprehension on the point in discussion by the insertion of the following clause: "2. That the said village shall, at the request of the said railways, of which request the execution of this agreement shall be complete evidence, but without varying and without prejudice to the legal position of any of the parties hereto, under the Consolidated Railway Act of 1879, and the amendments thereto, take the control of the said work, with power to let contracts and compel the carrying out of the same, but said work shall be done under the direction of Joseph Hobson, or in the event of his death or removal from his position as engineer, under the direction of such engineer as may be agreed upon, and failing an agreement, by an engineer to be appointed by the railway committee of the Privy Council, and said work shall be executed to the satisfaction of the inspector or engineer appointed by the said railway committee."

Whatever objection might have been successfully urged by a rate payer of Parkdale against the action of the council, I think the plaintiff's prayer for an injunction against the prosecution of the work is effectually answered by the connection of the railway companies with it, and by their statutory powers and obligations; and, the work being done under the railway acts, it follows, in my opinion, that, if the plaintiffs are entitled to compensation, they must seek it under those acts; and that we should, therefore, allow the appeal and dismiss the action, with costs.

OSLER, J.A.—I shall first consider the case apart from the alleged justification afforded to the defendants by the order of the Privy Council and the agreement with the railway companies, and the first thing is to endeavor to ascertain precisely the relation in which the corporation or municipality of Parkdale stood to the work which has caused the injury the plaintiffs complain of.

The inhabitants of the municipality are the corporation,

municipal act, 46 Vict. ch. 18, sec. 3, (O.) and the council are their governing body or agents for whose acts, within the scope of the corporate powers conferred by the municipal act or special acts, they are responsible.

If the defendants had done these works under, or in accordance with, the powers conferred upon them by the Ontario statute, 46 Vict. ch. 45, the plaintiffs' claims would be strictly for compensation to be ascertained by arbitration under the provisions of that act, and these actions would fail for that reason. As it is, they are maintainable only, if at all, as what would formerly have been called actions on the case for the special damage caused to the plaintiffs up to the time of their commencement, by the wrongful act of the defendants in interfering with the street, and not for compensation once for all in the sense in which that word is used in the special act and the railway acts.

I do not think we can altogether lay the former act out of view in considering how far the corporation may be answerable for what has been done regarding it as a mere tort and without any legal justification. I do not differ from the courts below on this point.

If it was within the general scope of the powers conferred upon the council by the act—if it could have been done by them under any circumstances or for any purpose, then if they were assuming to do it under the act, they could not escape liability by setting up that their powers had been exercised in an improper manner or at an improper time, or without compliance with some condition precedent required by the act. I may illustrate what I mean by the proceedings which the corporation are authorized to take affecting public roads within the municipality (secs. 545, 546, 553); drainage works under sec. 570 and following sections, and other instances which might be referred to. In all these cases the corporation might be liable for torts committed in carrying out the work, though they had proceeded in a manner not authorized or even forbidden by the act.

When this special act is attentively considered it will appear upon what I venture to think is the true construction of the first and second sections, that either Toronto alone or Parkdale alone might agree with the railway companies to construct and let construction contracts for the whole undertaking, which from its very nature is one single entire thing. But the third section expressly requires that before letting any such contract or entering upon the construction of any such work the two councils of Toronto and Parkdale shall mutually agree on the proportion in which the cost thereof, including the compensation for damages, and for the cost of future maintenance shall be divided and borne between them. There is thus a condition precedent to the exercise jointly or separately of corporate powers under the special act. Nevertheless the doing of such a work cannot be said to be beyond the scope of the corporate powers of the defendants under all circumstances, for upon the condition precedent being performed it might have been lawfully done. I think there is a clear distinction between such a case, and one in which the council assume to do something which is beyond the scope of the corporate powers under any circumstances, or for any purpose, as *e. g.*, if they had assumed to construct a subway in the city of Hamilton or elsewhere, in the absence of the conditional legislative authority to do so, which existed here.

I am therefore not prepared to hold that if the council, either placing a wrong construction upon the special act or wantonly determining to disregard its requirements, chose to proceed with the work under its assumed authority, the defendants the corporation whom they represent would not be liable.

But there is another aspect of the case from which the difficulties in the plaintiffs' way appear to be extremely formidable.

The work in question was ordered to be done by the Railway Committee of the Privy Council by an order of the 24th November, 1883, made pursuant to the 46 Vict

ch. 24, sec. 4, (D.) an act to amend the Consol. Railway Act, 1879.

In one of the reasons against the appeal it is said that the act is *ultra vires* the Dominion Parliament, but counsel for the plaintiffs expressly declined to argue this objection. We may therefore assume that it was the duty of the railway companies to do the work, and that, if it had been done by them, the plaintiffs must have sought their remedy under the provisions of the railway act.

It was actually done by one Godson under a contract made by him with the defendants. If he had contracted immediately with the railway companies, he might, so far as I can see, have defended himself under their authority.

If we ask how the defendants came to interfere, we find from a memorandum referred to in the order of the Privy Council, and from an agreement bearing even date therewith, made between the defendants and the railway companies, that they did so, and assumed the control of the works at the express request of and for the companies, and for the purpose of carrying out the order of the Railway Committee.

It is abundantly clear from the evidence that the defendants did not profess to act, and were not acting in execution of the powers conferred by the Ontario Act, but on the contrary that they were acting at the instance, and under the authority of the companies, who were bound to do the work.

In another of the reasons against the appeal, it is suggested that this was part of a scheme to avoid a just liability to compensate the landowners. We have been referred to no evidence in support of this suggestion, nor has it been made a part of the case on the pleadings.

The proceedings under the railway act seem to have been the inevitable consequence of the refusal of the city of Toronto to unite in carrying out the provisions of the Ontario act.

The work has been done, and it was conceded that it is beyond the power of the defendants to undo it. Any

attempt in that direction would at once be met by the railway companies insisting that it had been done at their instance under the railway act and Order in Council, and that four-fifths of the cost had been borne by them.

It was argued that the defendants were wrongdoers because they had no power to act as agents, and the railway companies could not delegate their authority to them.

On this point the case of *St. Peter v. Denison*, 53 N. Y. App. 416, and cases there cited may be noticed.

It may be conceded that it was entirely outside the powers of the defendants to contract with and to act as agents for the railways, as they have professed to do. It was foreign to any purpose for which municipal corporations were created, and probably any ratepayer or the Attorney-General might have intervened and restrained the governing body of the corporation from carrying on the proceeding.

We do not know what took place on the motion for the interim injunction, if such a motion was made, but the right of the defendants to do the work for the railway companies might have been then argued and disposed of. See *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. 449; *Attorney-General v. Shrewsbury*, 21 Ch. D. 752; *Richmond Water Works v. Richmond*, 3 Ch. D. 82, 97; *Great Northern R. W. Co. v. Eastern Counties R. W. Co.*, 9 Hare 306, 28 L. J. Ch. 521.

It would be a singular result if the defendants as a corporation can be held liable in successive actions for damages for an act which they cannot be allowed to undo, and which, lawful in the case of a natural person, is in theirs not so, only because wholly outside the scope of their corporate powers.

Even if they had no power to act as agents of, and to cause the work to be done for the railways, I do not see that it follows that as a corporation they must be deemed to have done it tortiously, or that it is to be imputed to them that they were wrongfully doing it under their special act, when it was proved that their agents, the council, were not acting in execution of that act.

The plaintiffs appear to be in this dilemma. The works might have been lawfully done by the railway companies or their agents.

The defendants have professedly done them at their request and as their agents.

If they could act as agents, they can defend themselves just as an individual could do under the authority of the railway act and order in Council.

But if it was not within the scope of their corporate powers so to act and to accept the delegated authority of the railways, it must be equally open to them to defend themselves from liability as a corporation on that ground also, and either way the plaintiffs fail.

I cannot regard the defendants' by-law of the 3rd December, 1883, as at all aiding to fasten upon them a liability as wrong-doers. It is not necessary to express an opinion as to its validity, but so far as it confers the sanction of the inhabitants of the municipality it is only to their acting as agents for the railways and contributing a sum towards the expense of the work.

My conclusion is, that the appeal should be allowed, and the plaintiffs left to their remedy against the railway companies, at whose instance, and by whose procurement the work was unquestionably done. I trust that it will be found that the provisions of the railway act are sufficiently elastic to embrace their claims.

I arrive at this conclusion not without sincere distrust of its correctness, as so many learned judges for whose opinions I have the most unfeigned respect think differently. It is, however, the only one I have been able to form, and the defendants are entitled to its expression.

HAGARTY, C. J. O., dissenting.

Appeal allowed, with costs.

PEORIA SUGAR REFINING COMPANY V. CANADA FIRE
AND MARINE INSURANCE COMPANY.

*Fire insurance—Conditions of policy—Construction of—Reasonableness of—
Limitation of actions.*

A fire insurance policy contained a condition that any action upon it should be barred "unless commenced within the term of six months next after the loss or damage shall have occurred."

Held, [affirming the decision of BOYD, C.,] that this condition must be considered to refer to the date of the destruction by fire, and not to the date at which the cause of action arose.

Seemle, per HAGARTY, C. J. O.—The six months limitation was an unreasonable one, as another condition provided that the insurance company should have sixty days for payment after completion of proofs of loss.

THIS was an appeal by the plaintiffs from the judgment of BOYD, C., (not reported) at the trial, dismissing the action, which was upon a fire insurance policy, on the ground that it was not brought within six months from the time the loss occurred, as required by the conditions of the policy.

The learned Chancellor at the trial stopped the defendants' evidence, ruling that evidence should first be given on the question of the time limit.

The appeal was heard on the 1st of March, 1885.*

Moss, Q. C., and J. W. Nesbitt, for the appellants.

The appellants objected at the trial that the respondents' case was not closed, and that their case should be concluded before the appellants should be required to give further evidence or argue the case, but the learned Chancellor required the appellants to proceed immediately, and on their not doing so at once dismissed the action. It was not in accordance with justice or the practice of the courts to have the evidence thus taken piecemeal, or for the judge trying the action to decide that he had for the present heard enough evidence for the defence and require the plaintiffs to proceed with evidence, after hearing which he might decide that the defence should proceed

Present.—HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A.

with further evidence. No cause of action accrued to the appellants until, at any rate, sixty days after delivery of the proofs of loss, that is on 25th January, 1882, and the action was brought within six months from that time. Limitation can only run from the time there is a cause of action. The limitation condition usually inserted in policies limits actions to twelve months. The condition inserted in the policy in question herein is unusual and unreasonable, and no effect should be given to it. The limitation condition being a condition defeating vested rights, should be construed strictly, and so considering it the court should hold that the action was commenced in time.

Osler, Q. C., and Laidlaw, contra.

The policy was subject to condition No. 21 stated in the third paragraph and pleaded in bar by the ninth paragraph of the statement of defence, namely :—"that every suit, action, or proceeding against the Company for the recovery of any claim under or by virtue of this policy shall be absolutely barred, unless commenced within the term of six months next after the loss or damage shall have occurred," and the plaintiffs joined issue thereon ; the loss or damage by fire occurred on the 27th day of October, 1881, and this action was commenced on the 25th day of July, 1882, which was too late. This was the only issue on the question of limitation of time for commencement of the action, and it involved a question of law which would put an end to the action if decided in favor of the defendants, and the learned Chancellor properly directed that it should be disposed of before proceeding with the evidence on the other issues. The matters of procedure referred to were in the discretion of the learned Chancellor, and are not the subject of appeal to this court.

The following cases were referred to in addition to those cited in the judgment: *Cowper v. Godmond*, 9 Bing. 748; *Ames v. N. Y. Union Ins. Co.*, 14 N. Y. 253; *Leny v. Virginia Fire and Marine Ins. Co.*, 9 Ins. L. J. 113; *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill.

466; *F. & M. Ins. Co. v. Chestnut*, 50 Ill. 111; *Andes Ins. Co. v. Fish*, 71 Ill. 620; *Ripley v. Astor Ins. Co.*, 17 Howard's Pr. R. 444; *Mickey v. Burlington Ins. Co.*, 35 Iowa 174; *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102; *Ætna Ins. Co. v. Maguire*, 51 Ill. 342; *Williamsburg Fire Ins. Co. v. Cary*, 83 Ill. 453; *Parker v. S. E. R. W. Co.*, 2 C. P. D. 416; *Watkins v. Rymill*, 10 Q. B. D. 178; *Davis v. Canada Farmers' Ins. Co.*, 39 U. C. R. 452; *Roach v. N. Y. & E. Ins. Co.*, 30 N. Y. 546.

April 17, 1885. HAGARTY, C. J. O.—This action was commenced on the 25th July, 1882. Plaintiffs are a company in the State of Illinois, the defendants an Ontario company at Hamilton. The claim states a policy of insurance dated 1st September, 1881, on plaintiffs' property and stock for \$5,000; loss by fire 27th October, 1881; with usual documents.

Defence setting out various parts of the policy, charging false representations, breaches of warranty, and changes in risk, and amongst other defences No. 21 gives this extract: "The insurance under this policy is made subject to the foregoing conditions, limitations, and requirements, which are hereby made a part of this policy, and every suit, action, or proceeding against the company for the recovery of any claim under or by virtue of that policy shall be absolutely barred, unless commenced within the term of six months next after the loss or damage shall have occurred."

No. 9. That the loss or damage by fire occurred 27th October, 1881; the proofs of loss were received by defendants on 26th November, 1881: that defendants have always disputed any liability under said policy: and the action commenced 25th July, 1882, more than six months after happening of loss &c., and claim therefore barred.

The plaintiffs merely join issue on the statement of defence.

The policy also contains provisions that the loss or damage shall be estimated according to the actual cash

value of the property * * to be paid sixty days after the loss shall have been ascertained in accordance with the terms and conditions of this policy, which are a part of the consideration for this insurance, and satisfactory proof of the same shall have been made by the assured and received at the office of the company in Hamilton.

At the trial before the learned Chancellor, he directed the plaintiffs to dispose of this question as to the action being too late before going into the general merits, and expressed his opinion that the lapse of time was a bar, unless explained, waived, or accounted for.

The plaintiffs offered no evidence on that point, and the result was the dismissal of the action, with costs.

I cannot see any objection to this mode of dealing with the case. If the objection be fatal it would be a useless task to hear and decide on the mass of written or oral testimony on the other issues raised.

The point has been several times before our courts.

In *Lampkin v. Western Assurance Co.*, 13 U.C.R. 361, the limitation clause was "twelve months next after the cause of action should accrue," with the usual clause for payment in sixty days after proof. Plea that fire took place and property destroyed more than twelve months before action brought. Held bad on demurrer. Sir J. Robinson says, it was assumed to be necessary to sue in twelve months after loss happening, while the policy spoke of twelve months after cause of action accrued.

In *Provincial Insurance Co. v. Aetna Insurance Co.*, 16 U.C.R. 135, the limitation was within twelve months after any loss or damage shall accrue. Defendants insisted that these words can only be taken to refer to the casualty insured against, and the court held that the defendants were right in that. It was a re-insurance case and plaintiffs argued that the loss meant the time they were put to loss by paying the amount.

In *Hickey v. Anchor Assurance Co.*, 18 U. C. R. 433, the limitation was six months next after any loss or damage should occur. The defence was pleaded and was met by

certain equitable answers, which were held insufficient. The court said there was no doubt the plea was a good legal bar. Mr. Justice Burns considered this six months limitation a very reasonable provision, "for the company will then know that they need not keep witnesses or look after proof and other things connected with a loss beyond the six months."

The American cases are very strong in favor of the construction claimed by plaintiffs. In *Mayor of New York v. Hamilton Insurance Co.* (1868), 39 N. Y. 45, the Court held that a clause like this "six months after loss or damage shall accrue" is to be construed in connection with the other clauses, and thus construed means that the action shall be commenced within six months after the right to sue the company has accrued. *Mix v. Andes Insurance Co.*, (1876) 9 Hun (N. Y.) 397, is to the same effect, citing the preceding case. In both cases there were clauses deferring payment until sixty days after loss, in one case "adjusted," in the other "ascertained and proved."

Hay v. Star, 77 N. Y. 235, (1879,) is to the same effect. It was considered doubtful whether in strictness the limitation applied except in a case where an award was made. The Court said: "The limitation should be construed to commence when the loss was due and payable, and not from the time of the physical burning of the property. The error of the position is in supposing that courts are bound to apply the words (after the loss shall occur) to the time the property was actually destroyed. It is far more reasonable to refer it to the time when the loss has become a fixed demand against the company, and the assured has a right to bring an action for it. The loss should be deemed to occur when the company pays it, or is lawfully called upon to pay it."

In *Steen v. Niagara Fire Ins. Co.*, (1882) 89 N. Y. 323. the facts are hardly distinguishable from our case except twelve months being the time instead of six. There it was declared that no claim should arise from the mere happening of the loss, nor until sixty days after proof received and loss satisfactorily ascertained and proved. The court

says that these conditions cannot be disregarded in getting at the true understanding of the parties as to the meaning of the clauses in question. That the company's contention narrows the twelve months down to ten and (p. 323) that having by postponement of time of payment secured itself from suit, it did not intend to embrace that period within the time, after the expiration of which it could not be sued.

In *Spare v. Home Mutual Co.*, U. S. Circuit Court, Oregon (1883) 9 Sawyer 142, the learned judge followed the New York cases, of which he approves. The conditions were substantially as here.

The subject is discussed in *May on Insurance*, 2nd ed., secs. 478-9; *Wood on Limitation of Actions*, (1883) p. 87, sec. 50, states the decisions in insurance cases, but refers to the Illinois case which takes the opposite view, *Johnson v. Humboldt Insurance Co.*, 91 Illinois Supreme Court 92 (1878.)

This was the clause as to the action twelve months next after the loss shall occur, and as to amount being payable sixty days after notice and proof, &c. The judgment of the court points out the words used here, "a plain, well understood and accepted meaning," and that according to the well known rules of construction "we are wholly unable to perceive how the meaning of this language can be misunderstood, or that different persons could arrive at other than one conclusion by simply reading the clause." * * When did the loss occur? Manifestly at the time the fire destroyed the property. In what consisted the loss? Obviously in the destruction of the building by fire. We are wholly unable to conceive that language could have been used that could have rendered the meaning plainer, * * "We have examined the authorities referred to * * although by respectable courts we should not feel bound by them as authority, and should hesitate long in reaching and adopting such a conclusion,"

We were also referred to *Cornell v. Liverpool and London Ins. Co.*, 14 Lower Can. Jurist 257, decided in 1869,

where the court adopted the literal view of twelve months next after loss has occurred. The effect of clauses as to payment after proof was not considered—apparently the case did not require it.

I cannot understand how words so very plain and distinct as those before us can be held to mean something wholly different, and I share the opinion so emphatically announced by the Supreme Court of Illinois that language could not have been used to have rendered the meaning any plainer.

We are asked to read the words “six months after the loss or damage shall have occurred” to mean six months after the plaintiffs’ cause of action has accrued. I think the distinction is perfectly clear. The New York decisions give us most admirable reasons for holding that such ought to have been the meaning of the contracting parties. I think we must hold that such is not the expressed meaning. We ought not to venture on such a wide departure from the very plain and evident meaning of the words used.

If I had the right to decide the case on my opinion of the reasonableness of a six months’ limitation in the same instrument that allows two months for payment after completion of proofs of loss, I would not hesitate to pronounce against the fairness of such an arrangement.

I think the judgment was right and that the appeal should be dismissed.

BURTON, and PATTERSON, JJ.A., concurred; OSLER, J.A., by consent of parties took no part in the judgment.

Appeal dismissed, with costs.

CLARK V. ECKROYD.

Money paid under mistake of fact—Negligence of payer—Demand or notice before action.

The plaintiffs ordered goods from the defendant in Montreal to be shipped to them in Toronto, and three several consignments were made, one of which having been addressed to "J. H. C. & Co.," instead of "H. E. C. & Co.," never reached the plaintiffs, but was, after remaining eighteen months in possession of the carriers, in due course sold for payment of the charges thereon. The plaintiffs in ignorance of the non-receipt of the third consignment accepted and paid the defendant's draft for the amount of the invoices of the three consignments. Subsequently they discovered their error and demanded a return of the amount paid, which the defendant refused.

Held, that although the plaintiffs had had the means within reach during all this time of ascertaining the true position of matters, there was no duty cast on them in relation to the defendant which made their delay in discovering the mistake laches on their part, and that they were entitled to recover back the amount paid as money paid under a mistake of fact.

Semble.—A demand of repayment or notice to payee of the mistake was necessary before action.

THIS was an appeal by the defendant from the judgment of the Common Pleas 'Division, reversing the judgment of Wilson, C. J., at the trial, and directing judgment to be entered for the plaintiffs.

The action was brought to recover back money which the plaintiffs had paid under a mistake of fact under the following circumstances: The plaintiffs, tradesmen in Toronto, carrying on business under the name of H. E. Clark & Co., had been in the habit of dealing with the defendant, who carried on business in Montreal, ordering goods from him, to be forwarded by the Grand Trunk Railway, and paying for them by accepting his draft on them after the goods had been received. Goods thus forwarded were delivered by the railway company in the usual course of business at the plaintiffs' factory in Toronto. Two invoices of goods thus sent, bearing date the 13th and 27th October, 1882, were forwarded, and the goods mentioned therein were duly received by the plaintiffs.

A third invoice, bearing date the 3rd October, but which should have been dated the 3rd November, 1882, for goods

to the value of \$335.92, was also mailed to and received by the plaintiffs, and about the 4th of November the defendant drew on the plaintiffs at four months from the 27th October for \$779.47, being the amount of the three invoices, less the usual discount. By some mistake in the plaintiffs' office, it was assumed that the goods mentioned in the third invoice had been received, and without any further communication between the parties the draft was accepted and duly paid. In point of fact, however, the goods in question never were sent to or received by the plaintiffs. The case containing them, as it afterwards appeared, had been shipped to Toronto, addressed to "J. H. Clark & Co.," and the railway company, having no reason to suppose that it was intended for the plaintiffs, did not deliver it to them or notify them of its arrival. Having remained in the company's freight sheds unclaimed for upwards of eighteen months, it was advertised for sale, and sold by them, pursuant to the statute, (a) to [pay the charges thereon. Some time after the sale the plaintiffs received information from their travellers which put them upon inquiry, and they then ascertained for the first time that the goods had never been sent to or received by them, but had been shipped and ultimately disposed of in the manner stated.

After the facts had been brought to the notice of the defendant and some attempts (which proved ineffectual) had been made to settle the matter, the present action was brought.

The case was by consent withdrawn from the jury. In giving judgment for the defendant, the learned Chief Justice expressed the opinion "that the plaintiffs had been put upon inquiry; that the goods had been forwarded, that they had been wrongly addressed, and that the invoice was faulty (that is to say, wrongly dated); yet upon that invoice the goods had been certified to as received at the factory, and upon that certificate had been paid for. The defendant receiving pay for the goods, and no question being raised as to them, had good

(a) 22 Vict. c. 66, s. 22, C. S. C. p. 766.

ground for believing that they had reached their destination and were satisfactory to the parties."

The certificate referred to was the mark or initials of one of the partners or a clerk placed upon the invoices on being laid before the plaintiffs with the draft for acceptance, and was merely intended to indicate that the goods had been received.

The appeal came on to be heard on the 23rd of November, 1885.*

Neville, for the appellant.—It may safely be asserted here that but for the culpable negligence of the plaintiffs the loss which has occurred would not have arisen. The plaintiffs are compelled to admit that notice of the consignment of the goods to them had been sent and received, yet although thereby the responsibility was cast upon them as the purchasers and consignees of the goods to apply to the railway company they entirely neglected such simple duty. The plaintiffs are thus shewn to have been guilty of gross negligence, which had they not been guilty of the loss could not have occurred. By the conduct of the plaintiffs in giving their acceptance and payment of the draft of the defendant for the price of the goods so sent the defendant was misled into believing that all was right, by reason of which he was lulled into security, in consequence of which he has lost all right to call on the carriers for the price of the goods. Under these circumstances, although all was done under a mistake of fact, still, as defendant cannot be restored to his original position, he has a right to look to the plaintiffs for indemnity. *Shand v. Grant*, 15 C. B., N. S., 324; *Bullen v. Henderson*, 2 Cowp. 365; *Freeman v. Jeffries*, L. R., 4 Ex. 189; *Watson v. Moore*, 33 L. T. 121; *Cocks v. Masterman*, 9 B. & C. 905; *Addison on Contracts*, 8 Ed. 1040; *Campbell on Negligence*, 69.

Geo. Kerr, for the respondents.—Looking at all the facts in this case, there can be very little doubt that the conduct

**Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

of the defendant, though everything was done in perfect good faith, was the cause of the difficulty which has arisen—first, his error in dating the invoice of the goods in question, 3rd October, 1882, instead of 3rd November of that year, was clearly calculated to mislead the plaintiffs, and no doubt did mislead them; but this was followed up by a much graver mistake committed in directing and forwarding the goods to J. H. Clark & Co., instead of to H. E. Clark & Co., and this no doubt was the principal, though not the primary reason for the goods having gone astray and never having been delivered to the plaintiffs or received by them. The defendant alleges by way of defence that the plaintiffs were not to accept bills drawn on them for goods until received by them and duly accepted. Here, however, there never was any delivery actual or constructive or receipt of these goods by the plaintiffs. The delivery to the railway company of the package directed as it is shewn to have been could in no sense be treated as a delivery to the plaintiffs; consequently the defendant never was in a position to claim or demand payment. On the whole case it is established beyond a shadow of doubt that the money which has been paid by the plaintiffs in respect of these goods was so paid under a clear mistake of fact, and therefore they are entitled to recover it back. *The Law Society of U. C. v. The City of Toronto*, 25 U. C. R. 190; *Sessions v. Strachan*, 33 U. C. R. 492; *Scott v. Kelly*, 17 U. C. R. 306.

January 12th, 1886. OSLER, J. A.—The general rule is fully discussed in the notes to *Marriott v. Hampton*, 2 Sm. L. Cas. 421, and is well settled viz., that a person may recover back money which he has paid to another under a mistake, as to the existence of the fact on which his liability to pay it depended, however careless he may have been in omitting to use due diligence to inquire into the fact, provided he did not mean to waive all inquiry: *Kelly v. Solari*, 9 M. & W. 54; *Townsend v. Crowdy*, 8 C. B. N. S. 477.

The rule is usually subject to the further qualification, that the person who received the money must not through the neglect or misconduct of the person who paid it be placed in a worse position than if he had *not* paid it.

It is on the latter ground mainly that the defendant contests his liability, though he also now makes the point that the present action at all events must fail, because there was no previous demand of repayment.

As to this objection; in *Kelly v. Solari*, Parke, B., said: "A demand may be necessary in cases in which the party receiving the money may have been ignorant of the mistake."

And in *Freeman v. Jefferies*, L. R. 4 Ex. 189, 200, Bramwell, B., puts it thus:

"If the plaintiff were, under the circumstances, entitled to be repaid the sum he claims, he ought to have given notice to the defendant, of the facts, by reason of which he was so entitled, because until he did so there could be no duty on the defendant to pay it over."

In the present case I think it quite sufficiently appears from the evidence that this at least was done.

The defendant was told of the mistake and how it occurred, and there appears to have been an attempt to compromise the matter. Had it been intended to rely on this objection it should have been expressly taken at the trial, where any doubt upon the subject could have been at once cleared up. It is too late to insist upon it now.

As to the principal ground of defence I agree with the decision of the Common Pleas Division. That the money was paid by the plaintiffs under a *bondâ fide* mistake of fact as to the goods having been received by them, and that such mistake was not discovered until after they had been sold by the railway company cannot be doubted. The case is therefore *primâ facie* within the general rule, and I see great difficulty in holding that it comes within the exception relied on by the defendant.

It can only do so if the negligence, of which the plaintiffs were undoubtedly guilty, was in respect of some legal duty they owed the defendant.

This is illustrated by the case of *Cocks v. Masterman*, 9 B. & C. 905 where the plaintiffs, who were bankers, paid

attached to the note in the hands of any one who took it after it became due.

The learned judge in the court below expressed himself as deciding the point with some degree of doubt, and we think that in the circumstances too narrow a view was taken of the defence.

The statutory right of set-off is not an equity, because it is a matter personal to the parties and wholly collateral to the note, and such, no doubt, apart from the agreement, would be the set-off claimed in the present instance.

If after it had arisen the parties had met together and credited it or allowed it upon the note, that would have been equivalent to payment or part payment, according to the case of *Callander v. Howard*, 10 C. B. 200. The same point was so decided in our own Court of King's Bench so long ago as 1823 in the case of *Brooke v. Arnold*, Tayl. R. p. 23.

Here there was no actual accounting together or allowance of cross demands on an account stated, so that the amount to be allowed as payment upon the note was never ascertained while Axford was the holder. But on principle can that make a difference where each item of the credit was given on the faith of the prior agreement?

What is it that constitutes an equity attaching to a note so as to affect it in the hands of one who takes it after its maturity?

Such a person is a holder with notice; the note, to use the familiar language of Lord Ellenborough, has come to him disgraced, and it is his duty to make inquiries concerning it. He is bound to ascertain whether it has been paid, and, if not, whether there is anything which affects the title of the holder to dispose of it.

The equity, therefore, to which such an instrument is subject, as the authorities abundantly shew, is something arising out of an agreement or dealing between the parties in relation to it, either at its inception or at any time afterwards, while in the hands of the holder who transferred it overdue, which directly affects his title to it. In other

words, it is something which, in the hands of such holder, is an incumbrance on the note.

In *Oulds v. Harrison*, 10 Ex. 572, 24 L. J. Ex. 66, an action by the indorsee of an overdue bill against the acceptor, who pleaded a set-off existing in his favor against the drawer, Parke, B., speaks of payment or the creation of a lien on the bill as constituting an equity, as distinguished from claims arising out of collateral matters, such as set-off, as to which, he observes, "The holder is *under no legal obligation to allow* the debt to be set off against the bill unless he *has entered into a contract to that effect* with the defendant, which contract would create an equity in favor of the defendant. His power to circulate it is not restrained simply by the existence at the time of a debt of equal value, and his circulating it is therefore no infringement of any existing right of the defendant. It is wholly contingent whether the defendant will have a debt due to him from the plaintiff when the bill is sued upon, and, if there be, whether the defendant will choose to plead a set off."

Holmes v. Kidd, 3 H. & N. 891, 28 L. J. Ex. 112, was relied on by the plaintiff as shewing that the equity must be one flowing out of the transaction out of which the bill or note arose; in other words, that it must have existed or derived its origin from circumstances which existed at the time the bill or note was first put in circulation.

I do not, however, read that case as establishing the proposition contended for. There the drawee had accepted a bill of £300, depositing with the drawer certain canvas which he was to be at liberty to sell as the means of providing for the bill. The bill was indorsed when overdue to the plaintiff, and afterwards the canvas was sold by the drawer, but did not wholly pay the bill. The question was whether the indorsee could recover, and it was held that as to the amount realised by the sale, he could not, because the agreement created an equity attaching to the bill in the hands of the party who took it over due.

No doubt the judgments refer pointedly to the fact that the agreement was one made when the bill was concocted, and was part of the consideration for it; but if the two

reports of the case are compared, it will very plainly appear that the *ratio decidendi* is that the agreement was one which related to and directly affected the bill, as distinguished from a merely collateral agreement. The decision would have been the same if the canvas had been deposited in the hands of the drawer on the same terms at any time while he was the holder.

In *re The European Bank, ex parte The Oriental Bank*, L. R. 5 Ch. 358, an equity between the indorser of an overdue bill and a third party was enforced in favor of the latter against the holder, the equity consisting in the circumstance that the money with which the indorser had purchased the bill was the property of the third party.

In *Britton v. Fisher*, 26 U. C. R. 338, a valid agreement between the payee and the maker, after the maturity of the note, to give time for payment, was held to be an equity attaching to the note, as against a subsequent indorsee.

Strictly speaking, payment or part payment, though sometimes called such, can hardly be said to be an equity attaching to a note, it is rather matter of discharge; but it is clear that agreements or dealings may occur in relation to it after it has been put in circulation, wholly independent of the original consideration, which may limit its negotiable quality after its maturity; *re Overend, Gurney & Co.*, L. R. 6. Eq. 344; *Graves v. Key*, 3 B. & Ad. 319; *Cook v. Lister*, 13 C.B. N. S.

The Canadian Bank of Commerce v. Ross, 22 C. P. 491, referred to in the judgment below, does not, as we think, govern this case, or, when properly considered, decide anything contrary to the views above expressed. There, the defendant, the maker of the note, did not deny his liability to pay it to some one, but attempted to set up a collateral agreement, to which he was no party, between the payee and the indorsee, under which he contended that the former, in privity with whom he was not defending, was entitled to a return of the note. This was held to be a mere collateral agreement, not affecting the note, or the title of the plaintiffs to sue thereon and to give the defendant a complete discharge.

In our case, the agreement was one which directly concerned, and was made in relation to the note. Credit having been given by the defendants on the faith of it while Axford was the holder, it appears to us that his title to dispose of it after its maturity became subject to their right to have the amount of such credit applied in reduction of it, in accordance with the agreement, and that this right is an equity which attaches to it in the plaintiff's hands.

The appeal must, therefore, be allowed as to the \$100 in question, and the judgment reduced by that amount.

The appellants having partly succeeded and partly failed, there will be no costs of the appeal or of the motion in the Court below.

TRAVIS V. TRAVIS.

Donatio mortis causa—Gift inter vivos—Delivery.

A verbal gift of personal chattels does not confer any property on the donee, if there be no actual delivery to him; Therefore where the mother of the defendant, while on her death-bed, gave to another son, J., the key of a drawer, containing a mortgage in her favor executed by the defendant, directing J. to give the instrument to the defendant in the event of her not again seeing him, and the defendant was subsequently summoned by telegraph to see his mother, and he thereupon again visited her, when she told him that his mortgage was in the drawer and that when he went home he should take it with him; but he did not on this occasion take possession of or see it. After the mother's death (intestate) J., as directed by her, handed the mortgage to the defendant.

Held, [affirming the judgment of BOYD, C., 8 O. R. 516] that there had not been such a complete delivery of the security as to constitute a gift *inter vivos* or a *donatio mortis causa*, and therefore that the money due on the mortgage formed part of the personal assets of the deceased.

Watson v. Bradshaw, 6 A. R. 656, observed upon.

THIS was an appeal by the defendant from the judgment of BOYD, C., as reported, 8 O. R. 516, where and in the present judgments the facts are fully stated and the points relied on sufficiently appear.

The appeal came on to be heard on the 22nd October, 1885.*

McClive, for the appellant.

Muir, for the respondent.

January 12, 1886. HAGARTY, C. J. O.—The property in dispute in this appeal is claimed by the appellant as having been the subject of a valid gift *inter vivos*, and also as a valid *donatio mortis causa*.

The cases are very numerous on this branch of the law, and it must be said that they are certainly not uniformly consistent.

The "*donatio mortis causa*" is fully defined in Williams's Exors, ed., 1879, p. 776, *et seq.* It must be in view of death. It must be conditioned to take effect only on the death of the donor of the subject by his existing disorder, and there-

* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

must be a delivery of the donation. It is ambulatory, incomplete, and revocable during the testator's life, and in this differs from a gift *inter vivos*. *Ib.*, 787.

See on this 1 Wh. & Tudor, 1013, notes to *Ward v. Turner*.

A gift *inter vivos* is complete if made by deed, or if made by parol it is accepted by the donee.

If this be viewed as a donation *mortis causâ*, I think the learned Chancellor was clearly right in holding that it could not be supported. The deceased's first delivery to the brother John was, as was held, conditional on her not seeing the intended donee again. She did see him again, and that was an end to that part of the case.

When she afterwards told the defendant, pointing to the drawer, "Your mortgage is there, when you go home you can take it with you." He replied, "All right," and John was not then present, and he had the key. But he did not touch or take it when he left after her death, and his brother John gave it to him before the present plaintiff had obtained administration.

I think, on the authorities, this cannot be upheld on the principles governing donations *mortis causâ*. I refer to such cases as *Richards v. Delbridge*, L. R. 18 Eq. 11, before Jessel, M. R.; *Moore v. Moore*, *ib.*, 474; *Breton v. Woolven*, 17 Ch. Div. 416; *Heartley v. Nicholson*, L. R. 19 Eq. 233; *Young v. Derenzy*, 26 Gr. 509. The subject is largely discussed in the notes to the leading case of *Turner v. Ward*, 1 Wh. & Tud. 1006, ed. 1877, and by Lord Eldon in *Duffield v. Elwes*, 1 Bligh. H. L. 536. In 1 White & Tudor, at page 1006, the law is discussed as to giving the chattel to any other person than the donee; it may be given to another for the donee, but not to another in the character of agent of the donor, and the donor must part with the actual dominion over the thing given.

The delivery of a specialty security for a debt is a good donation *mortis causâ* of the debt itself (p. 1008), so also as to a mortgage deed. Again, in the notes to *Ellison v. Ellison*, 1 Wh. & Tud. 290, *et seq.*, the subject is largely discussed as to gifts *inter vivos*.

I do not think that on the facts in evidence it could be held that the deceased became a trustee for the defendant as donee.

In *Richards v. Delbridge*, L. R. 18 Eq. p. 15, Sir George Jessel says: "It is clear and beyond dispute that for a man to make himself a trustee there must be an expression of intention to become a trustee, whereas words of present gift shew an intention to give over property to another and not retain it in the donor's own hands for any purpose fiduciary or otherwise."

He quotes Lord Justice Turner's words in *Milroy v. Lord*, 4 DeG. F. & J., 264-274: "If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument could be made effectual by being converted into a perfect trust."

He also quotes the emphatic language of Bacon, V.C., in *Warriner v. Rogers*, L. R., 16 Eq., 348, to the same effect.

See also notes to *Ellison v. Ellison*, 1 Wh. & Tud. p. 297; also p. 298, commenting on *Richards v. Delbridge*.

It remains to be considered whether it can be supported as a gift *inter vivos*.

Two objections are urged: 1st, that it was an incomplete gift; 2nd, that the defendant's evidence on this is not sufficiently corroborated.

This branch of the case is not much discussed by the learned Chancellor.

Apart from the corroborative objections, it seems to me that to support this as a valid gift, we must go a step further than any case I have yet seen.

We must treat it as wholly apart from the consideration of approaching death, or as done in contemplation of death. Was it a transaction which would be valid and binding between two ordinary persons? As is said in 2 Kent's Com. 445, ed. 1873: "The final and correct opinion was established that a gift *inter vivos* was irrevocable."

There was no manual delivery of the mortgage. It was pointed at by the donor as being in a drawer in her room,

where she and the donee then were. She told him it was there, and he could take it when he was going home. He did not see it then or touch it. He says it was not till after her death that his brother opened the drawer and said, "there is your mortgage." Defendant replied, it was all right, that his mother had told him it was there and for him to take it, and he said to leave it with his brother who could bring it up to him.

The brother thinks this occurred while his mother was still alive, but he does not think she saw or heard it as she was occasionally in long stupors.

The keys of the drawer were commonly with the deceased, but often with J. H. Travis, the brother in whose house the mother lived.

We have thus the mortgage merely indicated as being there without actual delivery, and remaining for several days. Certainly not in defendant's custody, but in a place readily accessible to his mother in the room where she slept.

I do not see anything to prevent her recalling what she had done if she had so pleased, and I hardly see how the defendant could have prevented her so doing or compelled her to give him the security.

The absence of evidence of actual manual delivery makes the case to differ from some in which a receipt for money due to donor from donee, was handed to the latter. Such as is discussed in *Moore v. Dartin*, 4 D. J. & Sm. 517.

There are also cases where, for a good consideration, or in payment of a debt, a parol sale or bargain is made of a chattel not actually delivered, as in *Viet v. Viet*, 34 U. C. R. 104, a case that certainly goes further than any other I have seen. It notices the apparent differences that modern decisions have made in older doctrines. *Irons v. Smallpiece*, 2 B. & Ald., 553; *Shower v. Pilck*, 4 Ex. 478, sanctioned by the very high authority of Lord Tenterden, and Holroyd and Best, JJ., are questioned in the cases noticed in *Viet v. Viet*.

Winter v. Winter, 4 L. T. N. S., 639, 9 W. R. 747, speaks of the two first cases as not overruled, but as "hit

hard." But in that case there was evidence of a change in the user and employment of the barge, the subject of the parol gift, which seems to have been considered sufficient.

The law is much discussed by Pollock, C. B., in *Re Harcourt, Danby v. Tucker*, 31 W. Rep. 578. He reviews all the authorities. He expresses dissent from *Irons v. Smallpiece*, saying: "The question to be determined is not whether there has been an actual handing over of property manually but whether looking on all the surrounding circumstances of the case, and looking particularly at the nature and character of the chattel which is proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give, and a clear intention on the part of the recipient to receive and act upon such gift."

The case did not turn merely on this point. In *Bourne v. Fosbrooke*, 18 C. B. N. S., 524, decided in 1869, Erle, C. J., says: "It being a rule of law that personal chattels cannot pass by parol gift without actual transfer of the possession," &c., &c. Channell, B., had so directed at the trial. No cases for or against the proposition were referred to.

In *Carpenter v. Soule*, 88 N. Y., 257 (1882), the Court says: "There must be a delivery of the gift, the donor must part with his dominion over it, it must not rest in a mere promise." There the actual delivery of a receipt for the amount of the money in a mortgage of the donee, stating that it was to be indorsed on the mortgage was held a good gift of the mortgage money to that extent. Many of the American authorities are referred to. There is a large collection of them also in the notes to the American edition, 18 C. B. N. S., to *Bourne v. Fosbrooke* already cited. The case here would apparently turn on whether the gift was complete, leaving nothing to be done by the donor to complete it, in this respect differing so widely from a gift *causâ mortis*.

In *Douglas v. Douglas*, 22 *Law Times*, N. S. 129, 1870, Kelly, C. B., says: "I do not think that we are called upon at present to say whether we should overrule *Irons v. Smallpiece*, or whether a gift not made by deed and un-

accompanied by transfer, is invalid in law. Whenever that question shall come before me, I feel bound to say that I shall require much higher authority than the note of an editor, however learned or eminent to induce me to overrule a decision of Lord Tenterden, and his brothers in the Court of Queen's Bench."

The cases up to that time throwing doubt on *Irons v. Smallpiece*, were cited to the Court.

Neither the cases nor the text-books seem to speak with any decided authority on this vexed question.

I may refer to 2 Kent's Com. 438, 12th ed., 1873: "Delivery is essential both at law and in equity to the validity of a parol gift of a chattel or chose in action, and it is the same whether it is a gift *inter vivos* or *causâ mortis*, without actual delivery the title does not pass."

Then, especially in the notes, numbers of qualifications and apparently conflicting *dicta* are quoted.

In *Smith's Real and Personal Property*, ed. 1877, p. 708, it is merely said: "A gift of personal chattels to be valid and binding, must either be accompanied by a deed or by actual or constructive delivery of the possession. Hence a mere verbal gift of a chattel to a person in whose possession it is, does not pass the property to the donee unless the donee does some act testifying his acceptance of the gift," citing 2 *Stephen's Com.* 44; *Shower v. Pilck*, 4 Ex. 478, and *Bourne v. Fosbrooke*, *supra*. In *Williams on Personal Property*, ed. 1884, p. 44, it is said: "Personal chattels are alienable by a mere gift of them accompanied by delivery of possession, * * if I purport to assign, and yet retain the possession, the gift though made by writing (so that it be not a deed) is absolutely void at law;" citing *Irons v. Smallpiece*, and *Bourne v. Fosbrooke*; *Richards v. Delbridge*, *supra*, *Miller v. Miller*, 3 P. Wms. 356,

The subject is somewhat discussed in notes to *Ellison v. Ellison*, at p. 260, of 1 Wh. & Tud. After noticing *Irons v. Smallpiece* and *Shower v. Pilck*, it says: "In other cases it has been held that a *donatio inter vivos*, as distinguished from a *donatio mortis causâ*, does not require actual delivery, and it is sufficient to complete a gift *inter vivos*, that the conduct of the parties should shew that the ownership of the chattel has been changed." Citing *Flory*

v. *Denny*, 7 Ex. 583; *Ward v. Audland*, 16 M. & W. 862; *Winter v. Winter*, 9 W. R. 747.

In the edition of 1883 of Mr. Benjamin's work, p. 3, it is laid down in a note: "Parol gifts of personal chattels do not pass the property if there be no actual delivery to the donee." Citing *Irons v. Smallpiece*; *Shower v. Pilck*; *Douglas v. Douglas*; *Power v. Cook*, 4 Ir. C. L. 247.

In the list of cases cited, I do not find any of those in which the opposite opinion is expressed.

Our statute, R. S. O., ch. 62, s. 10, declares that no one shall "obtain a verdict, judgment, or decision * * on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

In *Sugden v. Lord St. Leonards*, 1 Prob. D. Sir James Hannen says, p. 179: "It is not necessary that I should find corroboration in every particular, and to the full extent of what Miss Sugden says before I give credit to her statements. Because that would be in other words to say that I ought not to use any evidence standing in need of corroboration, unless there were proof enabling me to dispense altogether with the evidence to be corroborated in those matters in which I do not find corroboration elsewhere."

In such cases as this, we must of course remember that corroboration is required as a rule of practice, and not under a statutable requirement.

Our act is very like in expression to the imperial act as to corroboration of a promise to marry. My learned brother Armour has fully commented on the question as to the measure of corroboration in *Parker v. Parker*, 32 C. P. 113, and reviews the cases.

He quotes the language of the late Chief Justice of this Court in *McDonald v. McKinnon*, 26 Gr. 12: "I do not agree that the evidence of a party claiming, must be corroborated in every particular. If it were so, it would be requiring the party to establish his whole case by independent evidence."

I have looked at the authorities cited by Armour, J., and I do not feel it necessary to decide whether there has been sufficient corroboration, as my decision rests on another ground. At present, I do not hold that there has not been sufficient corroboration.

On the whole I come to the conclusion that what took place in this case amounts to an imperfect gift; that assuming all the facts to be proved as plaintiff presents them, enough was not done to make the gift complete; that after what took place between deceased and defendant the former could up to her death have revoked what she had done or said, and have resumed full possession and control of the mortgage; and that it did not amount to an absolute irrevocable gift.

I have seen no English case in which it has been expressly decided that, even if there had been manual delivery here, it would have so vested the whole right in the donee, or, in other words, so wholly released him and his property from the debt and incumbrance, that he would not have had to ask the aid of Equity for complete relief; this of course as a mere volunteer he would not have obtained.

In the view I take we need not decide this point, but wait till it arises.

There are a large number of American authorities, probably not easy to reconcile. I do not think we should do anything to carry the support given to gifts of this character further than it has been expressly heretofore given in the English courts.

Edwards v. Jones, 1 M. & Cr., 226, referred to by Fry, L. J. in *Re Richardson*, 30 Ch. D. (at 404); *Finch v. Finch*, 23 Ch. D. 277; *Cross v. Sprigg*, 6 Hare, 555.

BURTON, J. A.—I agree with the learned Chancellor that there was no evidence to support the view that there was a *donatio mortis causa* of the mortgage in question; the delivery to the brother was not a delivery to him as the agent of the donee, but was accompanied by a direction to deliver it to the defendant in case the donor did not see

him again, which mandate was revoked by the defendant's last visit. The case must therefore depend upon what subsequently occurred.

I adhere to the opinion I expressed in *Purdom v. Murray, ante*, vol. ix. p. 369, as to the effect of a mere delivery of a mortgage or other chose in action not transferrable by delivery as a gift *inter vivos*. It is not necessary, in my view of the case, to consider whether any difference exists between cases of that kind and the present where the mortgagor is the intended donee, because I agree with the Chancellor in holding that the evidence of the defendant, which required to be corroborated, was not so corroborated.

That the deceased intended to make the defendant a present of the debt is, I think, clear enough; but whether she ever carried out that intention in the way suggested depends entirely upon the statement of the donee.

Now what is there to corroborate this statement? I confess I see nothing. Even if he had gone direct from his mother's room to his brother and demanded the mortgage I should have entertained great doubts whether that was any corroboration of the fact essential to be established; but he neither obtained nor made any effort to obtain possession of the mortgage until after his mother's death, when it was pointed out by his brother; but he did not obtain actual possession of it till a month afterwards. Now what does that establish? It is not inconsistent with the defendant's statement; but it is equally consistent with the view that the intention of the deceased was never carried out, and, as remarked by Lord Justice Lindley in *Finch v. Finch*, 23 Ch. D. 277: "Evidence which is consistent with two views does not seem to me to be corroborative of either." The statement therefore of the mother and the reply by the defendant, even if they would, if established, sustain the defendant's case, appear to me to be uncorroborated.

I fear that the decision is opposed to the real merits; but that is a misfortune we may regret but cannot remedy. I think the appeal should be dismissed, with costs.

I may add that, although I concurred in the judgment in *Watson v. Bradshaw*, I am not clear that my reasons, had I stated them, would have been in complete accord with those given by the learned Chief Justice who delivered the judgment.

PATTERSON, J. A.—The defendant has failed to shew any sufficient reason for our disturbing the judgment against which he appeals.

He borrowed from his mother the money which her administrator now sues for, and gave his covenant to repay it with interest in four yearly instalments, securing the payment by mortgage on his farm; and although the fact seems to be that the intestate had no intention to exact payment unless she required to use the money, and on her death had intimated her desire that the defendant should not be considered liable to pay the money, but that the security should be given up to him, yet, unfortunately for him, she did nothing that amounted to a release of the debt, either by way of *donatio mortis causa* or gift *inter vivos*.

The attempt in the statement of defence was to state facts from which a gift in one form or the other might be deduced, the pleader apparently having more hope of making out a *donatio* than a gift *inter vivos*.

I should have been prepared to find a demurrer in place of a statement of defence, if the statement of claim had not contained the allegation that the intestate, after John H. Travis had by her instruction indorsed on the mortgage and shewn to her a receipt for the principal and interest, handed the deed to him and directed him to take charge of it for the defendant.

That allegation was not proved. On the contrary the evidence of John H. Travis makes it clear that the indorsement, though made by the direction of the intestate, was not made in her presence, and that she never saw it, and never saw or handled the deed after the receipt was indorsed on it, and that her direction to John was merely to

hand it to the defendant in the event of her not having the privilege of seeing him again, which meant in case he should not arrive till after her death.

It is, therefore, unnecessary to attempt the task, which might be no easy one, of deciding what would be the effect of the alleged facts if they had been proved. We should of course endeavour to give the defendant the benefit of the principle suggested in *Barton v. Gainer*, 3 H. & N. 387, where Pollock, C. B., said: "That if a person gives the parchment on which the mortgage is written, we ought to give effect to his act as far as we can." Whether the effect would be virtually to release the covenantor by depriving the covenantee of the evidence afforded by the deed, was not decided in that case, inasmuch as the only question for decision was the property in the parchment itself; and there might be less foundation for contending that such a result would follow in the case of a deed of which, under our registry system, a duplicate original was always accessible.

The effort in the Court below would seem to have been to establish a *donatio mortis causæ*. That contention has been dealt with in the judgment of the learned Chancellor who has shewn it to be incapable of being supported. I agree with the views of the evidence which he expressed, and to which I cannot usefully add.

On the appeal it has been urged that a good gift *inter vivos* was established. If this were so, the defendant should have been in a position to defend any action which his mother, if she had lived, could have brought against him to recover the debt; but nothing that he has now been able to prove could be made available as a defence, or could, if he simply denied the debt or the covenant, have embarrassed her in her proof of it.

But I am convinced by my reading of the evidence, that the intestate never intended to part with her control of the deed, much less to abandon her right to the money, as long as she lived. The accounts of what took place, as given by John H. Travis and by the defendant, to my mind

agree in shewing that the object of the testatrix was only to provide, without formally making a will, for the release of the defendant after her decease. John says: "She told me on the 7th January, that she wanted me to give Robert that mortgage, if she had not the privilege of seeing him. To give it up to no person else but him—to him and no person else; made me promise that." Being asked if she made any other gifts at the same time, he spoke of directions to give her son Absalom, who was in Virginia, \$200, which she had in the Post Office Savings Bank, and fifteen acres of land in case he should ever want a home; these effects embracing, as we learn from other evidence, all she had to dispose of in addition to the defendant's mortgage, and being obviously intended for Absalom only after her death.

The defendant was telegraphed for by John immediately after the conversation with his mother, and hurried down, travelling all night to see her before she died. He tells us that the first words she spoke to him were: "Robert, your mortgage is there in the drawer in the bureau, and when you go home, you can take it with you." The defendant, whose evidence seems very candid and straightforward, says that he saw that his mother's end was approaching when he came down, and I see no reason to doubt that what she meant and what he understood, was that when he went home, after her death, he was to take the mortgage. He had no recollection of speaking with John about the mortgage till after his mother's death, which is significant of how he understood the proposed gift, particularly when we find John under the impression that before the death as well as after it he had opened the drawer and let Robert see the deed. This understanding by the defendant of what his mother meant is quite consistent with, and would not unnaturally follow from, her having on a former occasion told him, as he informs us, that if she never needed the money she was never going to ask for it.

The inconsistency will be noticed between the allegation of the pleader that the intestate had directed John to take charge and possession of the mortgage, which John did; and the testatrix's reference to the drawer of the bureau, which shewed that she treated the deed as still under her own control. In this particular, John's evidence agrees with that of the defendant in disproving the defence as pleaded.

We may sympathise with the defendant who apparently loses the bounty which his mother meant him to receive; but, having to deal only with his legal rights, there seems no course open to us but to dismiss the appeal.

OSLER, J. A.—I agree that the appeal must be dismissed.

The defendant unfortunately for himself has not succeeded in proving the alleged gift as a *donatio mortis causæ*, because it lacked the manual tradition or delivery to the donee of the thing itself or of the instrument evidencing the title to it, or of the means of obtaining possession of it, which has always been held essential to the validity of such a gift.

Can it then be upheld as a good gift *inter vivos*?

In the highest courts of the neighboring country, it has been held that there is no distinction between the two classes of gifts, as regards the necessity for actual delivery. "Gifts are valid without consideration or actual value paid in return. But there must be delivery of possession. The contract must have been executed. The thing given must have been put into the hands of the donee or placed within his power by the delivery of the means of obtaining it. Without delivery, the transaction is not valid as an executed gift, and without consideration it is not valid as a contract to be executed. The decision in *Wright v. Wright*, 1 Cowen (N. Y.) 598, was founded on a supposed distinction between a gift *inter vivos* and a *donutio mortis causæ*; but there appears to be no such distinction. A delivery of possession is necessary in either case." *Harris v. Clark*, 3 N. Y. 93.

This statement of the law was approved of in the well considered case of *Baskell v. Hasell*, 107 U. S. Rep. 602; see also *Parsons on Contracts*, vol. 1 p. 234.

To the same effect are the cases of *Irons v. Smallpiece*, 2 B. & Ald., 551; *Shower v. Pilck*, 4 Ex. 478; *Bourne v. Fosbrooke*, 18 C. B. N. S. 515, and notes to Am. ed. 528, and *Douglas v. Douglas*, 22 L. T., N. S. 127.

Opposed to these authorities are found the dictum of Parke, B., in *Ward v. Audland*, 16 M. & W. 871, and of Crompton, J. in *Winter v. Winter*, 1 B. & S. 997, (Am. ed. Add. Cas.); the decision of Pollock, B. in *Re Harcourt*, 31 W. R. 578, and of this court in the county court appeal of *Watson v. Bradshaw*, 6 A. R. 656.

I refer also to *Re Ridgway*, 54 L. J. Q. B. 570, and to *Re Mudson*, *Creed v. Henderson*, 1 Times L. R. p. 44, where it was held that a voluntary subscription to a charitable purpose, the donor having died before actual payment, could not be enforced against his estate after his death.

If a voluntary gift, not accompanied by change or delivery of possession, may be enforced, why, it may be asked, may not a voluntary contract or promise?

But even assuming that actual delivery is not essential to the validity of a gift *inter vivos*, and that the debt or chose in action secured by the mortgage might pass or be released by words of present gift of the mortgage deed and an assent thereto; and further that the defendant's evidence is, as I am disposed to think, sufficiently corroborated, it nevertheless appears to me to fall short of proving beyond a reasonable doubt a clear intention on the part of the donor to make, and of the donee to accept and act upon, an immediate absolute gift of the mortgage or mortgage debt. This, at all events, distinguishes the present case from that of *Watson v. Bradshaw* so far as regards the question of delivery. I think the proper inference to be drawn from the evidence and all the surrounding circumstances is, that the gift was only to be complete upon the death of the defendant's mother, and it is to be regretted that enough was not done to make that intention effectual. It is not

easy to believe, that if, contrary to the expectation of every one, she had recovered, she would not have been able to enforce payment of the mortgage, if she had desired to do so, it not having passed out of her actual custody and control. Compare on this point the recent case of *Morgan v. Dodson*, 1 *Times Law Reports*, p. 23, where the evidence of a waiver or gift of a promissory note by the holder in favor of the maker was held after the death of former insufficient.

Whether a verbal gift *inter vivos* of a chose in action not negotiable can be effectually made, even if accompanied by actual delivery of a document of title which evidences its existence, is a question which does not necessarily arise for decision here. Possibly the cases of *Barton v. Gainer*, 3 H. & N. 389, and *Rummens v. Hare*, 1 Ex. D. 169, may indicate, as a general rule, the limit of the rights of the donee in such a case. On this subject I refer to the cases of *Gott v. Gott*, 9 Gr. 165; *Long v. Long*, 17 Gr. 251, 259; *Howes v. Providential Life Ins. Co.*, 49 L. T. N. S. 133; *Re Richardson*, *Shillito v. Hobson*, 30 Ch. D. 396; *Moore v. The Ulster Banking Co.*, 11 Ir. R. C. L. 512; *Lee v. Bank of British North America*, 30 C. P. 255.

Appeal dismissed, with costs.

BRICE V. MUNRO ET AL.

Foreign judgment—Foreign corporation—Action against shareholder for unpaid calls—Execution—40 Vict. ch. 43, sec. 47 (D.)

In an action under 40 Vict. ch. 43, sec. 47 (D.) brought in Ontario against a shareholder, there resident, of a company whose head office was in another province, where judgment had been obtained by the plaintiff against the company and execution thereon had been returned unsatisfied.

Held, [reversing the judgment of ROSE, J., 7 O. R. 435] that the cause of action against the shareholder was complete without the return unsatisfied of an execution against the company in Ontario.

THIS was an appeal by the plaintiff from the judgment of ROSE, J. (7 O. R. 435), allowing the defendants' demurrer to the statement of claim.

The objection raised by the demurrer was that a judgment and execution in this province were necessary before an action could be maintained against a shareholder in a company upon a judgment recovered against the company in another province.

The appeal was heard on the 19th of October, 1885.*

Shepley, for the appellant.

The statute under which the action is brought (40 Vict. ch. 43, sec. 47, D.) makes the return of an execution against the company unsatisfied in whole or in part the sole condition precedent to the plaintiff's right of action, which condition is alleged in the statement of claim to have been performed. The statute nowhere expressly or by necessary implication prescribes the return of an execution in any particular province of the dominion, unsatisfied in whole or in part, as a condition precedent to the statutory right of action being pursued against a shareholder in that particular province. The act, being a dominion act, has force in all the provinces of the dominion, and as there are no dominion courts out of which the execution prescribed by the act could issue, it must be presumed that the intention was to give the creditor the statutory right of

**Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

action against the shareholder, upon its being shewn that an execution against the company, issued out of some provincial court, has been returned unsatisfied, which the statement of claim does sufficiently allege. Taking the act most strongly against creditors seeking to enforce its provisions, no sanction can be found either in the provisions of the act or in any reasoning founded upon them, for requiring the creditor to do more than obtain the return of an execution unsatisfied at the chief place of business or domicile of the company, and the statement of claim in this action alleges that such a return has been made.

On the contrary, reason and convenience very strongly point to the absurdity of requiring the creditor of a company incorporated under the dominion act, and carrying on its business of having its domicile in a particular province of the dominion, to recover a judgment against the company in every province of the dominion in which shareholders reside, without regard either to the domicile of the company or the province in which its assets may be situated.

The cases decided under the English act are not in point, inasmuch as under that act the leave of the court is required before the creditor can proceed against shareholders, and the granting of that leave is discretionary, and is exercised only upon proof of the exhaustion of the company's assets, and the return of an execution is there only *prima facie* proof of such exhaustion. Under our statute, however, there is no such discretion, and the return of an unsatisfied execution is made conclusive proof of the exhaustion of the company's assets.

If the English cases are in point, the defendants, instead of demurring, should have pleaded assets elsewhere than where the execution was returned.

In the event of this judgment being affirmed, the result may and frequently will be, that a creditor whose cause of action against the company accrues in one province where the company has its domicile and assets, will be unable to

recover judgment against the company in any other province by virtue of such provisions as rule 45 of the Ontario Judicature Act; and such shareholders as reside in the latter province will be in effect freed from the statutory liability, which could not have been intended by the act.

The provisions of section 61 of 40 Vict. ch. 43, do not furnish any argument against this contention, as the sole effect of that section is to provide that when service is allowed by the rules of procedure of the court out of which the process issues, to be effected upon the company at all, it may be effected in the particular manner pointed out by the section.

Besides, rule 45 of the Ontario Judicature Act is exhaustive, and service cannot be ordered in any case not within that rule.

The cases of *Gwatkin v. Harrison*, 36 U. C. R. 478, and *Page v. Austin*, 26 C. P. 110, are only decisions to the effect that *scire facias* is a proper and appropriate remedy against the shareholder when the creditor has obtained a judgment of the court upon which his *scire facias* may issue. Here the creditor has not, nor does the act require him to have any such judgment, and he can therefore bring his action in such form as the statute permits him to do.

Lash, Q. C., for the respondents.

If the plaintiff's contention be correct, the result would be, that there would be a cause of action against the defendants under 40 Vict. c. 43, s. 47, upon return of the execution against the company unsatisfied in whole or in part, issued from any court in the world. We contend, however, that this cannot be the effect of the statute, and that the section must receive a construction beyond its mere words—the scope and meaning must be considered. The section says that each shareholder shall be liable to the creditors, &c. Liable for what? If the words stood alone, it might be said that the shareholders were liable to a direct action by the creditors for their claims, but this is clearly not the meaning. They are liable for “the amount

due on the execution." This includes costs, and presupposes a judgment against the company; but before any liability arises execution must have been returned unsatisfied, and then each shareholder is liable to an action therefor.

We contend that the action referred to is not an action upon any cause of action moving from the defendants to the plaintiff, but an action whereby the plaintiff asks execution against the defendants for the amount due on the judgment. This execution may be asked for by *sci. fa.* or by ordinary writ of summons. A *sci. fa.* cannot be issued to obtain execution upon a judgment unless the judgment has been recovered in the court in which the *sci. fa.* is issued, and where the execution cannot be asked for by *sci. fa.*, it cannot be asked for by ordinary writ of summons, and therefore the statement of claim herein is demurrable, because it does not shew a judgment recovered against the company and an execution issued thereon in the courts of this province. The plaintiff's attempt to answer this consists mainly in the argument that a case may arise in which he never could enforce a claim against a shareholder, if the cause of action and the breach should wholly arise out of this province, and if the head office of the company were not here.

But if that be the result of the statute it cannot be helped. The section cannot be construed to mean more than it does mean, but as section 61 of the act under which the company is incorporated expressly provides for service, and as the question is one of service merely and not of jurisdiction over the cause of action, no inconvenience can arise such as suggested by the plaintiff. Besides, under the Ontario Judicature Act, rule 45, the company may be sued in this province, if they have assets to the amount of \$200, which may be rendered liable to the judgment. The unpaid liability of shareholders is assets. The judgment appealed from shews that service may be effected.

The authorities referred to are cited in the judgments.

December 23, 1885.—HAGARTY, C. J. O.—As the statement of claim is framed, it is not easy to understand with clearness the actual position of this company.

It is declared to be a joint stock company, incorporated under the Joint Stock Companies' Act of 1877 (40 Vict. ch. 43, D.), and it is called "The Morton Dairy Farming and Colonization Company of Manitoba." That plaintiff is a creditor of the company and recovered judgment against them in the Supreme Court of Lower Canada, at Montreal, "where said company had its principal office and place of business," and that execution was issued and returned "no goods and no lands."

Defendants are sued as representatives of Colin Munro, late of St. Thomas, in Ontario, a stockholder in the company, and that 95 per cent. is still unpaid on his stock.

The demurrer states the claim to be bad for want of averment of any execution in Ontario against the company.

We have not been referred to any case in which the point has arisen in our courts. The statute law in England is different from ours. There the proceeding is very plain and distinct.

The unpaid stock is treated as assets of the company to be reached by process in the nature of an extended execution.

Application is made to the court in which the judgment has been recovered for leave to issue execution against the shareholders. The clause in the Imperial act of 8 & 9 Vict. ch. 16, sec. 36, provides that if an execution at law or in equity be issued against the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any shareholder to the extent of his unpaid capital stock: "provided always that no such execution shall issue * * except upon an order of the court in which the action * * shall have been brought * * made upon motion in open court after sufficient notice in writing to the persons sought to be charged; and upon such motion such court may order such execution to issue accordingly."

As is said in *Gwatkin v. Harrison*, 36 U. C. R. at p. 481, though in a perfectly clear case the court on motion may allow execution to issue, the practice is that the proceedings against the shareholders shall be by *sci. fa.*

It seems, perhaps, unfortunate that in our legislature the remedy for creditors is provided in different language.

The point before us could not have arisen under the English act or practice.

Our clause 40 Vict. ch. 43, sec. 47, (D.) reads, "Each shareholder, until the whole amount of his shares has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon; but shall not be liable to an action therefor by any creditor, before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution, not exceeding the amount unpaid on his shares, as aforesaid, shall be the amount recoverable, with costs, against such shareholder."

It is to be observed that the Imperial act does not speak of *sci. fa.* But the courts very soon after decided that it was the proper proceeding.

In *Harvey v. Scott*, 11 Q. B. 92, Lord Denman says, (p. 106): "The proceeding by *sci. fa.*, was, I believe, first suggested by Lord Tenterden, and has since that time been acted upon as essential to justice in enabling parties charged under the statutes, to dispute their liability."

See also *Ransford v. Bosanquet*, in Error, 2 Q. B. 972.

In *Harwood v. Law*, 7 M. & W. at p. 208, Parke, B., in speaking of the language of 7 Geo. IV. ch. 46, sec. 13, as to execution issuing against members upon judgment recovered against the public officers, says: "The *sci. fa.* only shows that the party against whom it issues was a member of the co-partnership at the time of the *judgment*, and not at the time of issuing execution. In order to reconcile this difficulty, it seems to me that the *sci. fa.* may be considered as a part of the execution contemplated by the legislature in framing this section; and then the party being shewn to be a member at the time of the *sci. fa.*, he is liable." Lord Abinger says, that a *sci. fa.* is only, resorted to "for the specific purpose of making the judgment

and execution consistent with each other; since otherwise there would be judgment against A. and an execution against B., which would render the record absurd and inconsistent: but the *sci. fa.* makes the record technically correct, and the party has the opportunity of contesting whether he is liable to the execution or not."

He and Rolfe, B., do not appear to agree with Parke, B., as to the *sci. fa.* being the beginning of the execution.

On the application for leave to proceed by *sci. fa.*, the questions as to the previous attempts to recover from the company, and the existence of assets seem to be disposed of, and are not to be contested as a defence to the *sci. fa.*

I mention a few of the cases: *Cross v. Law*, 6 M. & W. 217. That under statute 7 Geo. IV. ch. 46, the proper proceeding was by *sci. fa.* and not by suggestion on the roll; and the rule is stated (p. 223), "wherever you seek to fix one party on a judgment given against another, it must be done by *sci. fa.*"

Under this act there was no limited liability. Execution was allowed to go against each partner on leave of the court after an ineffectual execution against the public officers.

In *Ilfracombe R. W. Co. v. Lord Poltimore*, L. R. 3 C. P. 228, 292, Willes, J., says: "I know that it has been held a good plea to a declaration on a *sci. fa.* that the company was possessed of property sufficient to satisfy the plaintiff's claim; but that may well be, because it is a condition precedent to the exercise of the jurisdiction of the court that the property of the company should be insufficient for that purpose. If, however, the property is insufficient, it is a matter for the discretion of the court whether or not the writ shall issue, and the existence of the property cannot therefore be relied on by way of plea, or as an answer to the right of the plaintiffs to have execution under the writ."

In *Rigby v. Dublin Trunk R. W. Co.*, L. R. 2 C. P. 586, judgment was in England for £11,000, and an application to the court was made for *sci. fa.* against English shareholders for amount of unpaid stock. It was shewn there was property in Ireland to about £500; *sci. fa.* was awarded. Keating, J., (p. 589.)

"As to the property in Ireland, we by no means wish to lay down that if the company had substantial assets in Ireland we should allow a *sci. fa.* to issue, but here the assets are totally inadequate to satisfy the debt, and it would, I think, be to exercise our discretion most oppressively to require a creditor for £11,000 to bring an action in Ireland to exhaust assets amounting to only £500 before proceeding against the English shareholders."

Montague Smith, J.: "The judgment is an English judgment, and there is no property in England; there is therefore in the words of the act (8 & 9 Vict. ch. 16, sec. 36) 'not sufficient whereon to levy execution,' and the court has therefore jurisdiction."

They all agree that if there was enough property to satisfy the whole or any great part of the debt the Court in its discretion might refuse to let the writ issue.

In *Kilkenny, &c., R. W. Co. v. Fielden*, 6 Ex. 81, an Irish railway company suing a defendant in England were compelled to give security for costs, although they shewed that they had their office in Westminster where their books, &c., were kept; that they had no property in Ireland, and four-fifths of their shareholders were resident in England, and most of the stock not paid up.

It was held that it was a foreign corporation, and Pollock, C. B., held that if defendant had to sue any English shareholder his impression was that he must first endeavour to make the judgment available in Ireland. Parke, B., considered the company to be in the same position as an individual resident in Ireland.

Hitchins v. Kilkenny, &c., R. W. Co., 15 C. B. 459, the head note is that to entitle a judgment creditor of a railway company to a *sci. fa.* against a shareholder, it is not enough to shew that a *fi. fa.* had been issued against the company and returned *nulla bona*. The affidavit must satisfy the court that due diligence had been used by the plaintiff to discover property of the company out of which he might obtain satisfaction of the judgment. It was an Irish company with English shareholders and

an office in London. Writs of *fi. fa.* had been issued to the county of Surrey in which the venue in the action was laid, and to Middlesex where the company had their offices. Other circumstances were mentioned, and the court were satisfied. One circumstance was, that the company's secretary told the applicant that the company had no property in Ireland.

In *Addison v. Tate*, 11 Ex. 250, Pollock, C. B. said (p. 255): "The court must be satisfied, before giving that order, (for *sci. fa.*) not only that execution has issued and been unsuccessful, (which must be stated in the *sci. fa.*), but also that due pains have been taken to obtain more."

In *Nixon v. Kilkenny, &c., R. W. Co.*, 1 H. & N. 47, the *sci. fa.* was obtained on affidavit of the return of *nulla bona* to execution against the company by the sheriffs of London, and that the defendants had no lands or goods in England, Ireland, or elsewhere.

In our courts the remedy under our statute law was almost from the beginning enforced by action: *Tyre v. Wilkes*, 13 U. C. R. 482; 18 U. C. R. 46 and 126; *Moore v. Kirkland*, 5 C. P. 452; *Jenkins v. Wilcock*, 11 C. P. 505; *Fraser v. Hickman*, 12 C. P. 584, and others.

The first statute enacting this provision was in 1851, 14 and 15 Vict. ch. 51, sec. 19.

In one of these cases, *Fraser v. Hickman*, it was objected that *sci. fa.* was the proper remedy. Draper, C. J., said, p. 586: "This is answered by the fact that actions of this character have been repeatedly upheld in the Queen's Bench and in this court: and further by the fact, that the statute when declaring that each shareholder shall be individually liable, &c., declares also that he shall not be liable to an action before an execution against the company has been returned unsatisfied in whole or in part. I have no doubt if a *sci. fa.* had been brought, it would have been contended with equal force and more reason, that an action was the proper mode of proceeding."

In *Gwatkin v. Harrison*, 36 U. C. R. 478, the proceeding by *sci. fa.* was adopted. I had occasion to review the authorities, and held that *sci. fa.* was an appropriate

remedy: that the shareholder is privy to the judgment recovered against his company, and that he could not offer any plea to impugn that judgment on the merits, and that the amount due on the execution against the company is the amount (with costs) for which the shareholder is liable.

In *Page v. Austin*, 26 C. P. 110, before the full Court of Common Pleas, Gwynne, J., delivering the judgment of the court, says: "I entirely concur in the judgment of the Chief Justice in *Gwatkin v. Harrison*, that *sci. fa.* is the proper and appropriate form of action for proceeding against a shareholder," &c., &c.

I remain of the opinion that it is an appropriate remedy and would be so in most, if not in every case in which a person not named in a judgment, and who cannot dispute it, except perhaps for actual fraud, is to be made liable therefor.

The question now for decision is, whether this defendant can be charged in an action on an execution returned without fruit in the province of Quebec.

Such a question could not arise if *sci. fa.* had been resorted to, for obvious reasons.

It becomes a very serious question whether in the proceeding by action there must always, as an essential preliminary to the shareholder's liability, be an execution issued and returned as against the company in the province in which the shareholder is sought to be made liable.

The apparent reason of the enactment seems clearly to be that a *bond fide* attempt should be made to realise a creditor's claim out of the partnership assets before resorting to the shareholder.

In *Moore v. Kirkland*, Sir J. B. Macaulay says, 5 C. P. p. 457: "I think it forms properly a matter for the jury, whether a return in form was such a return as the statute requires—namely, a return unsatisfied, not *pro formâ*, but after due diligence to realize the amount out of the effects of the company."

On the objection that the return to the execution by the sheriff of Perth was not from the venue laid in the action, the learned Chief Justice says: "The proceedings

and evidence do not shew where the venue is laid in the action against the company, but the evidence does shew that no execution could have been made available against the company."

Jenkins v. Wilcock was also an action against a shareholder under the statute. It was objected that the venue was laid in Durham instead of the county of the city of Toronto where the judgment and record (against the company) were, and also that as the railway ran through the counties of Peterborough and Victoria as well as through Northumberland and Durham *no fi. fa.* had gone to the former counties.

Draper, C. J., held that the venue was not local, that the judgment was not the foundation of the action, and the venue was no more local than in an action for escape or false return wherever the judgment had to be set out. And as to the second objection: "The statute speaks only of an execution against the company, not hinting at the necessity of more than one. I agree that execution must be issued for the purpose of obtaining satisfaction if it can be had—it is not to be a mere illusory formal proceeding, to give colour to proceedings against a shareholder, and possibly the shareholder might defend himself successfully by shewing the company had goods which might have been taken, or he might, if injured by negligence or connivance on the sheriff's part, have a remedy against him. * * If the proceeding has been illusory or fraudulent, it appears to me that the suggestion of it should come from the defendant."

My brother Rose, in his carefully prepared judgment (p. 438) considers that "the creditor has no further or other rights in an action commenced by an ordinary writ of summons than by *sci. fa.*"

On the most careful consideration of this matter I have been unable to satisfy myself that this position is tenable.

Our legislature may be considered as having the provisions of the Imperial statute (passed about 1846) before them when they adopted the provision we first find in the act of 1851.

At that time Quebec and Ontario were under one legislature, but with wholly different legal constitutions, and the one legislature granted charters to many companies, some confined to Quebec, others to Ontario, some to the whole province of Canada.

When Confederation came in 1867, we had several provinces with their own legislatures, and the government of the dominion granted charters to companies authorised to do business throughout the whole of confederated Canada, and have continued to use almost the same language as to the unpaid stock of shareholders, and the act governing this joint stock company, and all other companies chartered under the general law in 1877, repeats, with hardly any variation, the same language.

We must assume parliament to be legislating with full knowledge of the legal and constitutional position of the confederacy, and aware that stock may be subscribed for in any one or more or all the provinces.

I think we must hesitate long before adding to the words of the act by requiring an execution to be issued and returned in each province in which a shareholder may reside, before being able to reach his unpaid stock.

In fact the moment we hold that an ordinary action may be brought instead of *sci. fa.*, we may be met by a shareholder's argument, that the executions must be to the sheriff of the county in which he resides before he can be charged. So far as his protection and convenience are concerned, it is not easy to see how it can matter to him residing in a western county of Ontario, whether the execution against the company be in Montreal or Cornwall, or Kingston.

The only real interest he has is, that a fair and *bond fide* attempt be made to collect the amount from the company.

Here it is shewn that the execution issued where the company had its "principal office and place of business."

I think that *primâ facie* the requirements of the statute are satisfied and the defendant called on for his defence.

Sir James Macaulay and Chief Justice Draper evidently leaned to that opinion, and on very full consideration, I think it is consonant with the true meaning of the language and apparent design of the legislature.

The rights of creditors should be considered at least as fairly as those of parties and shareholders in a joint adventure entered into with a view to profitable investment.

It would add much to the difficulties in the way of those who have given credit to the company, if in addition it was necessary to go through the expensive, perhaps wholly useless, process of recovering judgment in every province in which they sought to recover from the shareholders.

In the view I take, it is unnecessary to discuss the question whether from the earliest introduction of this special provision, a company could or could not be sued in every province.

I think the appeal must be allowed.

BURTON, J. A.—If the point were *res integra* I should have thought it clear that under the statute we are now considering, a *sci. fa.* was not “the proper and appropriate form of proceeding” against a shareholder.

It is a mere statement of an elementary proposition that a judgment against an incorporated company cannot at common law be executed except against the property of the company, but in order to give creditors a more extensive remedy than they would have had at common law, the legislature in England rendered such judgments enforceable by execution against the individual members of the company.

The first statute there allowing an execution to be issued against a shareholder was the 7 Geo. IV. ch. 46, where the company was allowed to be sued through a public officer, and there the statute expressly provided that execution upon any judgment obtained against a public officer might be issued against any member of the company.

The 7 Wm. IV. and 1 Vict. ch. 73, empowers a creditor who has obtained a judgment against the public officer of a

company governed by it, to execute that judgment against all or any of the shareholders or late shareholders whom he might have sued for payment at common law, that is, whom he could have sued as a partner, subject to certain qualifications not material to this discussion.

We then come to the 8 & 9 Vict. ch. 16, the Companies' Clauses Act, which provides that the creditors shall not be entitled to proceed against the shareholders personally if payment can be obtained from the company, and leave became necessary before a *sci. fa.* or execution could issue against a shareholder, and in order to obtain such leave evidence had to be adduced to satisfy the court that payment could not be obtained from the company itself as a body.

It was found, however, that allowing a creditor thus to single out an unfortunate shareholder and compel him to pay large sums to which other shareholders should have contributed, worked great hardships, and thus induced the legislature in 1856 to repeal these acts and provide instead that creditors should have the power upon non-payment of the debts due to them from the company to cause it to be wound up.

It will be seen that in all these cases special provision is made for an execution issuing against the shareholders, and *sci. fa.* with or without leave, was therefore not only the appropriate, but the only remedy except that under some of the acts a judge was empowered to grant leave to issue execution upon a summary application.

In the case we are considering, the company is an incorporated company, the shareholders in which would not be liable directly to creditors but for the provisions contained in section 47, which creates a liability of a limited nature.

That liability is the creature of the statute; the language used is, "Each shareholder, until the whole amount of his shares has been paid up, shall be individually liable to the creditors of the company, to an amount equal to that not paid up thereon."

There is no doubt that whenever an act of parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the act contains some special mode of enforcing it, in which case that mode must be resorted to. It is clear, therefore, that an action founded on the statute lies, and with great deference, I should have thought *that* the only remedy.

It will be seen not only that it does not authorize an execution, but it does not even authorise the creditor to sue the shareholder for the unpaid portion of his stock, but makes him liable for a sum equal to the amount due on the stock, which creates an obligation and gives a right to sue for that sum.

This right to sue is all that the statute gives, and as I have observed, it is not even a right to sue for the balance due on the shares, but for a sum equal to that balance; that being the language of the enactment, it is very difficult to gather from it any implied authority to issue an execution or to obtain it upon *sci. fa.*

One of the earliest actions under a similar statute to be found in our reports, is the case of *Tyre v. Wilkes*, 13 U. C. R. 482, where it is treated as a new and independent action founded on the liability created by the statute. I have, when in practice, brought numerous such actions, and I must confess it would never have entered into my mind to suppose that I could proceed by *sci. fa.*

In the two cases in our own courts in which the right so to proceed has been discussed, it is quite possible that coming up as the question did on demurrer, the conclusion arrived at may have been correct, it being urged that it was a mere question of practice, upon which I express no opinion. But even assuming that a *sci. fa.* is the proper remedy against a shareholder residing within the jurisdiction of the court in which the judgment was recovered, that is no reason why we should refuse to give full effect to the language of the act, which gives an action against every shareholder wherever resident. The condition precedent being the same in all cases, viz., "that the share-

holder shall not be liable to an action for a sum equal to the balance due on his shares before an execution against the company has been returned unsatisfied in whole or in part."

It appears in this case that a judgment has been obtained against this company in the province of Quebec, where its head office is, and that an execution has been returned unsatisfied which satisfies the terms of the statute.

There can be but little doubt that the difference in our own enactment from those in England was deliberate and intentional, as, under such a system as that in force there, a shareholder not a resident in the province could only be reached, if at all, by a cumbrous and circuitous process. Under this enactment a shareholder, wherever resident, is liable to be sued, provided only the creditor has issued an execution against the company and procured a *bond fide* return that there is nothing in the shape of assets to satisfy it.

I do not quite follow the learned judge's reasoning in the concluding portion of his judgment when he refers to the grounds for a proceeding by *sci. fa.* being more proper and appropriate than the commencement of an action by writ of summons. I think he must have been under the impression at the moment that leave was necessary, but the court exercises no greater control over the one proceeding than the other, the plaintiff is left to his unfettered discretion, although I am strongly of opinion that our statute gives a new action founded upon the liability created by it, and it should therefore be commenced in the usual way.

I think the appeal should, for these reasons, be allowed, and the demurrer overruled, with costs.

PATTERSON, J. A.—The Morton Dairy Farming and Colonization Company, of Manitoba (limited), was incorporated under the Canada Joint Stock Companies' Act, 1877.

The plaintiff, who has recovered judgment against the company in the Superior Court for Lower Canada and has issued execution against the company which has been returned unsatisfied, brings this action against the executors of a deceased shareholder in the company, under the 47th section of the act.

That section (40 Vict. ch. 43, sec. 47, D.) enacts that each shareholder, until the whole amount of his shares has been paid up, shall be individually liable to the creditors of the company to an amount equal to that not paid up thereon; but shall not be liable to an action therefor by any creditor, before an execution against the company has been returned unsatisfied in whole or in part; and the amount due on such execution, not exceeding the amount unpaid on his shares, as aforesaid, shall be the amount recoverable with costs against such shareholder; and any amount so recoverable, being paid by the shareholder, shall be taken as paid on his shares.

The objection raised by the defendants' demurrer is, that a judgment and execution in this province are required before an action can be brought against the shareholder.

I do not see that such a limitation of the terms of the statute are indicated by anything to be gathered from the statute itself, or by reasoning from what may be conjectured to be the object in requiring execution against the company before the creditor can resort directly to the shareholder.

The provision was first introduced into our legislation, so far as I am aware, in the railway clauses act of 1851, 14 & 15 Vict. ch. 51, where it appears in section 19 in language almost identical with that of the section which we have now to construe.

That statute applied to the whole province of Canada, the two divisions of which were as independent of each other in the constitution and jurisdiction of their courts as they are at present; and the objection now made would, if valid, have been equally so at that time.

The Imperial Statute 8 and 9 Vict. ch. 16, the companies' clauses act, had been in force for five or six years when the railway clauses act was passed, and there were enactments *in pari materia* of still earlier dates, as *e. g.*, in 7 Geo. IV. ch. 46, 1 Vict. ch. 73, and 7 & 8 Vict. ch. 110. It is not improbable that the provision of section 19 of our Act of 1851 was suggested by these English acts, and particularly by section 36 of the companies' clauses act. The principle of each is the same, and the details in which our statute differs from section 36 will be found significant when we remember that it was intended to apply not to one province alone, but to the two provinces of Upper and Lower Canada.

Section 36 enacted that "If any execution, either at law or in equity, shall have been issued against the property or effects of the company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders to the extent of their shares respectively in the capital of the company not then paid up; provided always, that no such execution shall issue against any shareholder except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court after sufficient notice in writing to the persons sought to be charged; and upon such motion the court may order execution to issue accordingly."

The court was thus clearly designated to which the creditor was to resort for execution against the shareholder.

Under one or more of the prior statutes the practice seems to have been to proceed by *scire facias*, which issued without special leave of the court against existing members of the company: (*Lush's Pr.* 580.) Soon after the passing of the companies' clauses act, the question was mooted whether the proper proceeding under that act was not by order of the court without any writ of *scire facias*, which was the mode under 7 & 8 Vict. ch. 110, sec. 68; and I understand the ultimate decision to have been that, while the court had jurisdiction so to proceed, a *scire facias*:

was more appropriate for the trial of questions of fact, which at that date were rarely, if ever, tried in courts of common law without the aid of a jury ; but the *scire facias* was not issued except by leave of the court obtained upon the return of a rule *nisi* : *Hitchins v. Kilkenny, &c., R. W. Co.*, 10 C. B. 160 ; *Devereux v. Kilkenny, &c., R. W. Co.*, 5 Ex. 834 ; *Rastick v. Derbyshire, &c., R. W. Co.*, 9 Ex. 149 ; *Nixon v. Kilkenny, &c., R. W. Co.*, 1 H. & N. 47 ; *Ilfracombe R. W. Co. v. Poltimore*, L. R. 3 C. P. 288 ; *Lee v. Bude, &c., R. W. Co.*, L. R. 6 C. P. 576.

In the last mentioned case, Willes, J., speaking of section 86, said (p. 580):

“The mode of proceeding under that section is, to obtain a judgment against the company, and to use every available means to enforce that judgment against the property of the company ; and then, failing to obtain satisfaction, to apply to the court for leave to issue a *scire facias* to have execution against the property of the shareholders.”

The cases shew the care with which the courts inquire into the truth of the allegation that there cannot be found sufficient property or effects of the company wherewith to satisfy the execution, refusing leave to issue the *fi. fa.*, or afterwards giving judgment for the shareholder, if it appears that there are sufficient property or effects, whether in England or elsewhere.

No such supervision is provided for by our statutes. The simple pre-requisite is the return of an execution unsatisfied. In *Jenkins v. Wilcock*, 11 C. P. 505, it was argued that a declaration against a shareholder was bad for not averring that an execution had issued into every county where the railroad of the defaulting company ran, but that was held to be unnecessary. Draper, C. J., said: “The statute speaks only of an execution against the company, not hinting at the necessity of more than one. I agree that execution must be issued for the purpose of obtaining satisfaction if it can be had—it is not to be a mere illusory formal proceeding, to give color to proceedings against a shareholder. * * If the proceeding has been illusory or fraudulent, it appears to me that the suggestion of it should come from the defendant.”

One material difference between the remedy under our statutes, whether pursued by *scire facias* or by ordinary action against the shareholder, and the remedy under the English act, is the absence with us of the necessity for the preliminary order of the court which affords some protection to the shareholder; and it therefore becomes difficult to see any practical difference between an action commenced by writ of summons, and one commenced by writ of *scire facias*. Whenever the execution against the company is upon a judgment obtained in a court of record in this province, it seems to be optional with the creditor to proceed by *scire facias* or by what was under the old system an action on the case. The former mode was held to be appropriate in *Gwatkin v. Harrison*, 36 U. C. R. 478, and in *Page v. Austin*, 26 C. P. 110, under similar provisions in other statutes; and, the proceeding by *scire facias* being technically an action, it satisfies in that particular the language of the section.

But our legislature, while adopting the principle of the English statutes, and so far following the phraseology of section 36 of the companies' clauses act, as to avoid the use of the word "judgment," which, though found in other acts, was dropped in framing section 36, possibly because not technically appropriate to some proceedings on which execution might be obtained against the company, departed from its model by using no expression which confines the creditor, in seeking his remedy against the shareholder, to the same court, or to the same province in which his action against the company was prosecuted.

This circumstance is in my opinion very significant against the contention of the defendants, whether we have regard to the original clause of 1851, when the legislation extended to two provinces, or to that of 1877 which embraced all the provinces of the dominion.

To hold that the execution against the company must be from a court of the province in which the action is to be brought against the shareholder would be to add to the statute something which is not there, but which would

doubtless have been inserted if the legislature had so intended.

The whole argument for the restricted reading of the statute depends on the position that the shareholder either must be proceeded against by *scire facias* for the enforcement of the principal judgment, which can only be done in the court whose judgment it is, or by an action which is permitted in place of *scire facias*, but is only permitted where a *scire facias* would lie.

This is answered, to my mind conclusively, by the reading of our statutes, which omit every detail of the English clauses by which the proceeding by *scire facias* is necessitated, although the terms of the enactment may not exclude that proceeding when the principal judgment happens to be in the court in which it is desired to proceed against the shareholder, and when that court is a court of record. See *Taylor v. Crowland Gas Co.*, 11 Ex. 1.

When we free ourselves from the idea that the statute can only be satisfied by the form of proceeding by *scire facias*, or in other words, when we see that the remedy against the shareholder need not be in technical form, notwithstanding that it may be in effect, the enforcement against him of the execution obtained against the company, there remains no valid reason for refusing to be satisfied with the literal construction of the statute, or for insisting that the legislature meant something beyond what has been expressed in words.

On the contrary, it seems sufficiently apparent that to adopt the construction contended for by the respondent might, in some cases, be to deny the creditor any remedy against the shareholder, so far as he depends on this statute.

He might be unable to bring the company within the jurisdiction of the courts of the province where the shareholder lived, by reason of his cause of action having arisen elsewhere, or from the company's not being bound to obey the process of the courts of a province where it had no office or effects; and if he could obtain a judgment, it

might be of that merely illusory character which Draper, C. J., deprecated in the remarks which I have quoted from his judgment in *Jenkins v. Wilcock*.

It is probable that the case before us illustrates both of these hypotheses.

We know nothing of the facts beyond what we learn from the statement of complaint; but knowing from that source that the judgment is in a court in the province of Quebec, we have no reason to assume that it could have been obtained in this province; and we have nothing before us to suggest that there were ever any effects of the company in this province exigible on execution against the company, while we may reasonably conjecture that, if there are any such effects, they are to be found either in the province where we are told the head office and chief place of business are situate, or in the province of Manitoba, which, from the corporate name of the company, seems to have been where the dairy farming and colonization were, or were to be, carried on.

I think the demurrer should be overruled, and that we should therefore allow the appeal, with costs.

OSLER, J. A.—I see no reason to doubt that the cases of *Page v. Austin*, 26 C. P. 110, and *Gwatkin v. Harrison*, 36 U. C. R. 478, were well decided in their circumstances. I think that *sci. fa.* is an appropriate form of proceeding against a shareholder within the jurisdiction, where the judgment recovered against the company is not a foreign judgment, and I therefore agree with those cases as far as they go. But upon full consideration I am constrained to hold, contrary to my first impression, that it does not follow that, because *sci. fa.* is an appropriate action when the facts will admit of it, an action which is not *sci. fa.* will not also lie. I think we cannot so limit the language of the act as to hold that the execution therein mentioned, must have been obtained against the company in that particular province of the dominion, in which it is wished to sue the shareholder. The argu-

ment so much pressed upon us, that under the practice of our courts there is nothing to prevent the company, though not resident in this province, from being sued to judgment here, loses its force as soon as it is seen that the enactment on which the shareholder's liability depends in this case, is precisely the same as that which is found in acts passed prior to confederation, and at a time when our procedure did not admit of an action being brought against residents out of the jurisdiction, and when, therefore, if a judgment and execution here, against a company whose head office was at Montreal, was a necessary preliminary to an action against a shareholder here, no such action whether *sci. fa.* or original, could ever have been successfully maintained against him, since none could have been maintained against his company. The case does not seem to have been presented to my brother Rose in this view, and for the above reasons and those mentioned in the judgment of the Chief Justice, I think, with great respect, that the appeal must be allowed.

Appeal allowed, with costs.

hands of David Jack, and his liability upon it as an indorser is therefore at an end.

The mortgage in question was given to David Jack for the purpose of indemnifying him against the payment of the note indorsed by him for the accommodation of William Jack, and the payment of the promissory note was a satisfaction of the condition of the mortgage.

The money with which the note was retired was handed by the defendant William Jack to David, who received it without any notice of fraud or of any trust imposed upon it, and applied it in payment of the promissory note, for which purpose it was given to him, and it is not pretended that he had any notice of the circumstances of the alleged fraud on the part of William Jack; on the contrary it was admitted by David in the court below that he received and paid over the money without notice and as an innocent party, William Jack having received valuable consideration therefor.

The evidence shews that the money in question when paid to David Jack, was the property of William Jack, having passed to him from Morgan in the regular course of dealing between them, and the relationship between William Jack and Morgan in respect to this money was that of creditor and debtor.

Here the money paid to David Jack passed from his hands to a third party, who received the same for valuable consideration and without notice, and the money has not been ear-marked and no attempt has been made to trace it, and the right to follow it, if it ever existed, has been wholly lost.

The mortgage having been satisfied, the rights of the respondents as execution creditors and as owners of the equity of redemption have become vested, and their title and interest in the lands are paramount to any presumed equity in Morgan.

The authorities cited are referred to in the judgments.

December 23, 1885. HAGARTY, C. J. O.—It appears from the evidence that William Jack obtained the \$4,000 from the petitioner Morgan, for the purpose, as he stated, of putting him in funds to pay for sheep, which he stated he had bought for Morgan. He had been buying sheep and selling them to Morgan for several years. The latter says he had bought from two to six car loads from him each year. He always used (as petitioner says) to deliver the sheep to him at Lindsay. He would go to farmers and buy a lot, paying earnest money down. Farmers would deliver them in Lindsay for him. "I don't know whether he bought them in his name or my own—never told him to buy in my name. I would see nothing of the sheep until I went for them. I never knew what price he paid. I think in 1883 I was to pay him per pound."

The contract is produced. By this Jack agreed for four double decked car loads of good export sheep at Lindsay to be weighed, &c., at five cents a pound, deliverable from 1st to 20th July.

Petitioner says: "The delivery of the sheep was to be from him to me. He would have to pay for the sheep before he got them. He was to gather the sheep in from the farmers." When he got the \$4,000 from Morgan he represented he had five double decked car loads of sheep and others bought for him. He had previously got \$250 from Morgan, who told him when he was giving the \$4,000 that the \$250 would pay for the earnest money. Jack said it would take the whole amount to pay for the sheep, and that he had contracted for more sheep. He was to meet Morgan on 13th July in Lindsay to deliver the sheep.

According to the evidence this was false. When Morgan went down to Lindsay he could find no sheep there for him, and as far as we can see Jack had not purchased or at least paid for any available for Morgan. He absconded very soon after. He paid \$1,000, which appears to have been part of the money received from Morgan to his brother David to take up a note for that sum, then current in the Dominion Bank. It was his own note payable to and

indorsed by his brother for his accommodation, and also indorsed by Hugh Gregg when last renewed, the bank requiring further security. David Jack does not appear to have been in any way cognizant of any wrong dealing between William Jack and Morgan. He knew they had dealings together, and William told him he had got some money from Morgan.

William appears to have left the country about 6th August, and David heard reports that he had gone away with a large amount belonging to other people not very long after he left, and he says he heard of this before he took up the note; after this Morgan came to see David, and David says this was the first time he had any idea that the money paid to him was his (Morgan's) money. Morgan says that he went to Chicago, and saw William there about 6th August; after his return he had the interview with David. But a letter which William wrote to David from Chicago is dated August 1st, and mentions Morgan having been to see him. David further states that some time after William's departure, and before the note fell due he was notified by the bank manager at Lindsay that William had absconded, and that he was liable on the note, and David says he paid the note "before it was claimed that this money was part of Mr. Morgan's money."

It was conceded in argument that the note was retired before it was due, and did not go to protest. If the petitioner's contention be sound he would have the right to follow his money into the hands of the Dominion Bank, who would in such an event lose not only the money paid, but the security which they had given up, and their recourse on the indorsers, certainly against Gregg, probably against David Jack.

I think this could never be allowed. The case is wholly different from that of money or chattels stolen from the true owner who never lost or gave up his property therein. The money was in this case paid to William Jack by Morgan on a contract between them. This contract was perhaps liable to have been avoided by Morgan as obtained

from him by fraud, but, until so avoided, William had the possession and property therein, for a special, but none the less so because he wrongfully applied it to another, purpose.

The distinction is well pointed out in *Moyce v. Newington*, 4 Q. B. D. at p. 85, and the general rule of law is stated by Lord Cairns in *Cundy v. Lindsay*, 3 App. Cas. at p. 464: "If the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has 'purported to pass' the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside, because those circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced." See also *White v. Garden*, 10 C. B. 919, 924, 927, remarks of Cresswell and Talfourd, JJ. The remarks as to goods and chattels will apply with even greater force to a sum of money.

Where money, specie, or paper used and taken as currency is stolen, Lord Mansfield fully explains their essential difference in *Miller v. Race*, 1 Sm. L. C. 523. "It has been quaintly said 'that the reason why money cannot be followed is because it has no ear-mark' but this is not true. The true reason is, upon account of the currency of it: it cannot be recovered after it has passed into currency. So in case of money stolen, the true owner cannot recover it, after it has been paid away fairly and honestly upon a valuable and *bond fide* consideration; but before money has passed in currency, an action may be brought for the money itself."

Wilde, B., says in *Foster v. Green*, 7 H. & N. 881, 886: "The first point was, that there is no distinction between money and any other chattel in respect of the ability of the owners to follow it in the hands of a third person, where it has been taken dishonestly out of the owner's possession. There is no case supporting such a contention, and it is opposed to the characteristic peculiarity of money, which

distinguishes it from other chattels, namely, that it is the highest degree of currency."

I may also refer to the learned judgment of Sir James Macaulay in *Gore Bank v. Hodge*, 2 C. P. 359.

In the present case, Morgan gave no specific coins or bills to William Jack. He gave him a cheque on the Dominion Bank, on which he got their bills; they undoubtedly became his to deal with with innocent persons as any other money Morgan expected he would apply the money to pay for sheep which he would deliver to him on a future day. William Jack was apparently making contracts in his own name to buy sheep from farmers. It would, I presume, have made no substantial difference or given any real cause of complaint to Morgan if William Jack, not having really made any contracts, as he untruly stated to Morgan, had afterwards gone and spent the money buying other sheep, which he had ready for Morgan at the appointed time.

I think it impossible to hold that Morgan could have interfered with the bank who received payment for the note, which they gave up in the ordinary course of business. I also think, on the evidence, that we must hold that David Jack could not be called to any account by Morgan for his receipt of the money from William, or his applying it to take up the note. We cannot implicate David without imputing to him a guilty cognizance of William's fraud, and the evidence does not warrant such a conclusion. He knew his brother had many dealings with Morgan; he knew that he had received money from him, and that the \$1,000 paid to him by William had come from Morgan; but I think we cannot impute anything further to him to affect our judgment. It was from Morgan himself, he declares, he first heard of the true nature of the dealing between them, and under what circumstances his brother obtained the money.

It is not necessary to express any opinion as to the alleged criminal aspect of this dealing. Morgan expressly disclaimed all intention of resorting to the criminal law, and

on the evidence before us it is better, I think, to treat the case apart from any alleged criminal offence.

I think the result must be to dismiss the appeal.

As to the right of following property or securities,—unlawfully disposed of by a person obtaining them for a special purpose, so long as they or any property into which they have been changed, so long as no innocent purchaser for value is injured,—see the leading case on the subject, *Taylor v. Plumer*, 3 M. & Sel. 562.

BURTON, J.A.—The judgment of the learned Chancellor should be affirmed.

The mortgage in question was given simply as an indemnity, and to save David Jack harmless against his indorsement of a note indorsed by him for the accommodation of William Jack.

The note was paid before maturity to the bank who were then the holders, and David Jack never has been damnified,

It is claimed that the money from which the note was paid was Morgan's money. It does not appear to me to be very material whether it was or was not as regards the parties sought to be affected by these proceedings; it is sufficient, I think, to say that the purpose for which the mortgage was given has been attained and it no longer exists as an incumbrance on the property.

If the mortgage had been formally assigned by David Jack to Morgan it would not have assisted him; it was not a mortgage for the payment of the note, in which case there might be some room for the argument with which we were pressed at the hearing, that it was in effect a payment by Morgan and not by the maker, and that, having obtained a transfer of the mortgage to himself, he might be treated as purchaser of the note and entitled to hold the security for its payment.

The condition of the mortgage having been satisfied, the execution creditors are entitled to enforce their lien against the lands, and the judgment therefore should be affirmed and this appeal dismissed, with costs.

OSLER, J. A.—This appears to me to be a perfectly clear case.

Assume that William Jack stole Morgan's money—that he obtained it by false pretences there is no doubt—but assume that he stole it, and that with this stolen money he had gone to the Dominion Bank and had personally paid to them the note indorsed by his brother David and Gregg, the bank being innocent, is it possible to argue that the money, which they had thus received in good faith and for a valuable consideration, could be recovered from them? It was money and had passed in currency and could not in such circumstances be recovered by the true owner: *Miller v. Race*, 1 Sm. L. C. 468. What William Jack did was to give this money to the plaintiff in order to pay the note with it, and he received and applied it in good faith for that purpose.

The case is, in my opinion, to be looked at just as if William Jack had himself paid the money to the bank. He merely used the plaintiff's hand in doing so. Is there any reason to doubt that the note was paid as against the bank? That they could never have enforced it against the maker or the indorsers? I should say not.

If the indorser was discharged by payment of the note, had he or the bank any further claim upon the mortgage which he had taken for his own indemnity from the maker? Plainly not.

Then if the note was paid, and the owner of the money could have sued neither the bank nor David Jack, the indorser, where is his equity to stand in the latter's shoes as regards the mortgage he had taken to indemnify himself against the liability on his indorsement? I can see none, nor have we been referred to a single case which looks in that direction. Morgan is merely a simple contract creditor of William Jack, unable to recover the money in specie, and equally unable to set up again for his own benefit any liabilities or securities which have been honestly discharged by it.

Gibert v. Gonard, 33 W. R. 302, cited by Mr. Lash, does not touch this case. It merely decides that where money is advanced by way of loan for a specific purpose, and in the event it turns out that it cannot be applied for such purpose, it may, if it can be traced in specie in the possession of the borrower or his assignee in bankruptcy, be recovered back by the lender, as the borrower stood as regards such money in a fiduciary position towards the lender. The same principle was recently acted on in this Court in the case of *Bailey v. Jellett*, 9 A. R. 187.

On the facts I see no ground for arguing that there was any agreement between the Jacks and Morgan that the money for which he had become William Jack's creditor, or any of it, should be treated as being secured by the mortgage in question, and it never has in fact been assigned to him: *McIntyre v. Thompson*, 6 O. R. 710.

PATTERSON, J. A., concurred.

Appeal dismissed, with costs.

RE THE STANDARD FIRE INSURANCE COMPANY.

KELLY'S CASE.

BARBER'S CASE.

COPP, CLARK & CO.'S CASE.

CASTON'S CASE.

Winding up company—Contributories—Subscription—Payment—Set-off of solicitor's fees.

The act of incorporation of the Alliance Insurance Company provided that no subscription to stock should be legal or valid until ten per cent. should have been actually and *bond fide* paid thereon. This company was amalgamated with the Standard Fire Insurance Company, and when the latter was being wound up the appellants were placed by the master at Hamilton upon the list of contributories.

Held, that K., B., and C., C., & Co., who had subscribed for stock but paid nothing thereon, were improperly made contributories.

C. subscribed for stock on the condition that he should be appointed solicitor of the company; he was appointed as such, and received and retained in his possession for some years a share certificate, which stated that he was the holder of ten shares, on which \$100 had been paid. This was paid by giving him credit in the company's books for his charges to that amount for services rendered. He never repudiated the shares.

Held, that he was properly made a contributory.

APPEALS from the orders of PROUDFOOT and FERGUSON, JJ., declaring that the appellants were properly placed by the master at Hamilton upon the list of contributories to the Standard Fire Insurance Company a corporation in process of liquidation. *Kelly's Case* is reported, 7 O. R. 204, and the other cases in the same volume, p. 448, where, as well as in the judgments delivered in this court, the facts are stated and the authorities referred to.

The appeals were heard on the 10th of February and 17th of March, 1885.*

A. C. Galt, for the appellants.

Bain, Q. C., and *Laidlaw*, for the respondents.

* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

April 17th, 1885. BURTON, J. A.—KELLY'S CASE.—The principles governing such cases as *Nasmith v. Manning*, 5 A. R. 126, 5 S. C. R. 417, and *Page v. Austin*, 30 C. P. 108, 7 A. R. 1, are not necessarily applicable to the case we are now considering, which is an application by the official liquidator to have the appellant's name placed upon the list of contributories under the winding-up Act. In the cases I have referred to, where an execution creditor was pursuing his statutory remedy and seeking to have an execution issued against one of the partners, it was necessary to shew that the defendant was a shareholder in the strictest sense of the term.

The distinction will be made very clear by comparing such cases as *Ness v. Angas*, 3 Ex. 805, and 4 Ex. 21, and *Robinson's Case*, 2 D. M. & G. 517, whilst I find it difficult to suggest a case where a party liable under a *sci. fa.*, would not be held to be a contributory.

A perusal of the opinions of the dissentient judges in the Supreme Court, in the former of these cases, has not at all weakened my confidence in the correctness of the judgment arrived at by this court, when the case was before us on appeal. I quite agree that if there had been any such finding of fact by the judge at the trial, as is assumed by Mr. Justice Gwynne, we ought to have arrived at a different conclusion; but that learned judge appears to have thought that this court reversed the learned judge on a question of fact, and much of his judgment is devoted to remarks upon the grave responsibility assumed by a Court of Appeal in venturing to reverse a judge of first instance upon questions of fact, a proposition in which I entirely concur; but it was because the learned judge had not found the facts that we were driven to the necessity of considering the evidence for ourselves. In my own judgment I say (5 A. R. p. 138): "If the learned judge had found as a fact that notice of allotment had been sent by post to the defendant, then I think we must have held, in deference to the authorities, that there was a completed contract between the parties."

And again (p. 139): "I entirely concur with the view apparently taken by the learned judge at the trial, that there was no evidence to warrant the conclusion that these letters were sent to the defendant."

And again (p. 141): "I do not, for the reasons I have mentioned, consider the special findings of the judge sufficient to fix the defendant with liability as a member of the company."

My Brother Patterson also remarked, in the course of his judgment (p. 152): "I do not think the plaintiff's case is established by the facts which are found; and I do not think there was evidence of the fact of the sending of the notices."

It was therefore, in consequence of the learned judge, who saw and heard the witnesses, having found himself unable to find the particular facts which were necessary to establish the liability of the defendant, that the duty devolved upon us of considering them as jurors, and so considering them, and being in as good a position to consider them as the Divisional Court, who also had not the advantage of seeing the witnesses, we were unable to hold them proved.

But I do not think the decision in *Nasmith v. Manning* necessarily decisive of this case. By the very terms of the contract there the only agreement of the defendant was, that whenever the company allotted shares to him, not exceeding the amount named by him, he would pay ten per cent. and pay future calls. It was not as if an agent of the company had called upon the defendant, and obtained from him an unconditional agreement to take a certain number of shares which the company bound themselves to give; but by the express provision of the agreement the company reserved to themselves the right to grant or refuse allotment, and if Mr. Manning had applied to the company before actual allotment, the company were clearly at liberty to say, we refuse to allot you any shares. It was on these grounds that our judgment proceeded, viz., the construction we felt compelled to place upon the particular contract then under consideration, the fact that the learned judge

who tried the case had not found any valid allotment, and our inability to find any thing upon the evidence to fix the defendant with notice or knowledge of the allotment.

But Mr. Galt contended that the document produced as the subscription for stock was a mere unilateral agreement imposing no obligation upon the company to allot him any shares, and that though it used words importing an agreement, it did not, in substance, differ from an application.

If the liability of the subscriber had depended upon this document alone, it might possibly be difficult to see upon what precise grounds it could be placed. If, for instance, the winding-up order had been made the day after the document had been signed, and before any action had been taken on it by the company, it might be very difficult, upon the evidence before us, to give an intelligent reason for holding him to be a contributory within the meaning of the winding-up act. Sec. 48 of that act declares that every shareholder or member of the company is liable to contribute the amount unpaid on his shares of the capital or on his liability to the company, or to its members or creditors under the act, charter, or instrument of incorporation of the company; and the amount which he is to contribute is deemed an asset of the company, and a debt due to the company payable as may be directed under the act.

The appellant here would not, under the circumstances I have referred to, be a shareholder; nor do I think he would have been liable under the agreement, inasmuch as he could not, so far as we can see on the evidence, obtain the stock in respect of which it was given, and which was the only consideration for it. But the liability does not depend upon the agreement alone: the act of the agent in obtaining the subscription was ratified by the company, and Kelly's name entered in the stock book of the company, and all the notices usually sent to shareholders were sent to him.

This was a clear intimation to him that the company recognised his subscription, and the act of the person who

professed to act for them, and were prepared to carry out their portion of the contract by granting the shares to which his agreement referred.

But the question yet remains, whether the liquidator has succeeded in shewing that the appellant is liable to be placed upon the list of contributories. This must depend upon the language of the winding-up act, 45 Vict. ch. 23, (D.) and the charter of the Alliance Company, and the act of parliament amalgamating that company with the Standard.

Sec. 48 I have already referred to, which extends only to persons who are shareholders or members of the company.

The older winding-up acts in England were repealed by the act of 1862, and there the term "contributory" receives a very wide meaning, extending to every person liable to contribute to the assets of the company. Our act seems to confine its operation to persons who are actually shareholders or members of the particular company being wound up. In this case it is the Standard Company, and the liquidator has to establish, if the question is still open, that the appellant was, at the commencement of the winding-up, a shareholder in that company.

His agreement was to take shares in the Alliance, and the clause in the act of parliament regulating the subscription to the stock of that company declares that the stock shall be vested in the several persons who shall subscribe for the same, subject to the provisions of the act. And then follows a proviso that no subscription shall be *legal or valid* until ten per cent. shall have been actually and *bond fide* paid thereon.

I was inclined upon the argument to think that it was not open to the appellant to allege his own non-payment of the instalment as a ground for evading his liability, but the language of the statute was not brought to our notice, and is very peculiar.

It was probably intended to apply, in the first instance, to the subscriptions required as a preliminary condition to the company's commencing operations; sec. 6 providing

that when \$50,000 shall have been subscribed and \$5,000 paid in, a meeting should be called for the election of directors to enable the company to exercise its corporate powers, as the persons named and the persons to be associated with them were only to become a body corporate after having complied with the requirements of the act as to the subscription of stock.

But neither the persons named in the act nor such other persons as desired to associate themselves *with them* were to be corporators or members until they had both subscribed and paid; and one can well understand, in a company of this kind requiring a large amount of capital in order to carry on its business safely and efficiently, that such a provision might be a very salutary one.

The present subscription was made after the complete organization; and I do not doubt that when the company accepted the subscription, it became legal and valid for what it purported to be; viz., an agreement on the one side to grant the stock on payment of the ten per cent., and an agreement on the other to pay that amount and take the stock; but it was not a subscription by the terms of which the party became then and there a stockholder, or entitled to shares.

In various charters, passed during the same session of the legislature, very different language is used; although I observe that many of the promoters are the same.

In that of the Canada Fire and Marine, immediately following the charter of this company, the shares are to vest *at once* in the persons who subscribe, although the provisional directors are authorized to receive from the *shareholders* a deposit of ten per cent. on the amount of their stock subscribed.

So in the case of the Industrial and Commercial, passed at the same session, the subscribers immediately became shareholders on subscription, and the provisional directors were authorised to receive a deposit of five per cent.

Mr. Bain relied upon an English case, *East Gloucestershire R. W. Co. v. Bartholomew*, L. R. 3 Ex. 15, as shewing

that the words in this charter could not be held to indicate that the payment of the ten per cent. was a condition precedent; but Mr. Galt gave, I think, a satisfactory answer, that there the defendant had signed the subscription contract, that particular shares had been allotted to him, and his name was on the register.

Sec. 3 of the special act provided that certain persons named, and all other persons who should thereafter subscribe to the undertaking, should be united into a company. They became, therefore, members at once on subscribing; and the only remaining question was, as to the construction to be given to the proviso which declared that the company should not issue any shares created under the authority of this act, nor should any share vest in the person accepting the same, unless and until a sum not less than one-fifth part of the share shall have been paid up in respect thereof.

The proviso recognises that the subscription creates the share, and merely provides, as the court held, that no certificate should issue nor should the share vest in the subscriber so as to enable him to transfer it, but that he was nevertheless a shareholder. The restriction was, in fact, similar in its effect to that in many of the charters I have referred to, which prohibits a right to vote or transfer until a certain proportion of the subscription was paid up. *Purdey's Case*, 16 W. R. 660, is to the same effect.

The case in the New Hampshire Reports was more in point: *Piscataqua Ferry Company v. Jones*, 39 N. H. 491.

There, however, the Act of Incorporation provided that the capital stock should be divided into shares of \$50 each, and the defendant subscribed the stock book agreeing to take the number of shares set opposite to his name, and to pay the assessments thereon at such times as the directors might order. At a meeting of stockholders held subsequently to the opening of the stock books, a resolution was passed that all the subscribers of stock not heretofore admitted be now admitted members of the corporation.

Under a by-law of the corporation made at the preliminary meeting for opening stock books, it was provided that ten per cent. should be payable on subscription, or the subscription should be *void*.

It was there held, that this being a regulation made by the company itself might be waived, and much stress was laid upon the circumstance that the provision was, that the ten per cent. was payable on subscription, and not as it is in the case before us that the ten per cent. shall be actually paid. The court there thought it was no forced construction to hold that the intention was not, that each subscriber by the terms of his subscription and the by-law was obliged actually to pay his ten per cent., but that this amount should, upon subscription and as part of the contract of subscription, be payable at once, or whenever the company should choose to demand it.

The other case referred to by Mr. Bain, *The Ogdensburg, &c., R. W. Co. v. Wolley*, 40 N. Y. 118, seems rather to be an authority against him. The court there (p. 120) says: "If the statute not only requires a subscription on the books, but that such subscription should be attended by a cash payment of ten per cent., to make a valid contract, and one binding on the parties, the defence must succeed. On the contrary,

* * if the subsequent payment of the ten per cent. voluntarily or involuntarily, so that the company actually got the money, invested the defendant with all the rights of a stockholder, and he could have compelled a delivery of the stock to him when the action was brought, there is no defence."

I do not understand that an agreement to take stock is invalid or prohibited by the statute; but I understand that no *subscription* is of any actual validity until the ten per cent. has been paid. Until the payment the subscriber is in the position of a person who has agreed to take stock. After payment he is invested with the full rights of a shareholder.

I think that all that can be said in this case is, that Kelly contracted to take the shares, and upon the payment of the ten per cent. he would have been entitled to become

a shareholder ; but he was not a shareholder, and therefore did not, under the terms of the amalgamation Act, become a shareholder in the Standard.

Upon this ground I think the appeal should be allowed, with costs ; but as the objection was not taken below, no costs of the proceedings there.

BARBER'S CASE.

COPP, CLARK AND Co.'s CASE..

CASTON'S CASE.

In these cases the appellants signed powers of attorney authorizing a Mr. Crawford, the manager of the Alliance Company, to subscribe for shares in the company. Mr. Crawford did not subscribe the stock book, nor did he authorize any one else to do so ; but he caused an account to be opened in the company's books as if they were respectively shareholders, charging them on the debit side with the full price of the shares. It was urged, in support of the position, that this was a sufficient subscription ; that a written application is never necessary, but an allotment on a verbal application is quite sufficient. The analogy is not very perfect. In such a case, the applicant having been allotted and having accepted shares is a shareholder ; but it is not necessary to consider whether this would have been a sufficient subscription, inasmuch as the ten per cent. was never paid in the two first cases, and, according to our judgment in *Kelly's Case*, there never was a legal and valid subscription.

Another nice question might have arisen if this were not sufficient to dispose of the case, viz., whether there was not a condition upon which alone they consented to become subscribers. The cases are very distinguishable from those in which a condition is spoken of at the time the subscription is made, but is not embodied in the contract. Here authority was given to be acted upon only in a certain event, and it may be open to doubt whether the principal

could have been bound by a subscription entered into under such circumstances until the company were prepared to carry out their portion of the contract ; but, for the reasons given, it is unnecessary to consider that point.

Caston's Case stands on a different footing. He sent in a power of attorney in the same form as the others, and he was duly appointed solicitor for a certain local district, was allotted shares, was credited on account of them with his account for services to the extent of the ten per cent., and was furnished with a certificate of the stock standing in his name.

I do not think there can be any doubt that he became a shareholder in the Alliance, and, upon the passing of the act amalgamating that company with the Standard, a shareholder in that company.

As to him the appeal must, I think, be dismissed, with costs ; as to the others allowed, with costs in this court and in the court below.

HAGARTY, C. J. O.—As to *Kelly, Barber, and Copp's Cases* I agree in the judgment just delivered. As to *Caston's Case* I assume for the purposes of this case that the liquidator has no higher power than the company. If the company had sued Mr. Caston for a call, I think he could not have successfully urged that he was not a shareholder. I think there are cases in which a person's status and liability as a shareholder can be established without an actual subscription or written agreement to take stock.

In the case before us he had a claim against the company for legal expenses, \$100. He arranged with the company that this should go against the ten per cent. payable on ten shares. The company so entered it in their books, crediting his stock account with \$100 as paid on stock, and sent him a certificate in the usual form as set out in the exhibits, certifying his holding of the ten shares on which \$100 was paid.

He held this in his hands about two years. If the shares had gone to a premium, he could have sold and obtained an

advantage thereby, and he would clearly have been entitled to dividends. Prior to this certificate he had been appointed their Toronto solicitor—date, 30th October, 1880.

On the 27th of the same month he had formally appointed Mr. Crawford to subscribe for the ten shares, and in the same document he states that he encloses “ten per cent. thereof,” and confirms all his attorney may do.

On the 9th November, he gets the certificate of ownership, and admission of receipt of the ten per cent.

On the other hand, if Mr. Caston should bring an action for his professional services, I think it clear that the company's defence as to \$100 worth of such services would be complete.

If he is right in the assertion of his non-liability in the case before us, he would I think be equally right in insisting on payment of his costs as solicitor.

PATTERSON, J. A.—KELLY'S CASE.—If the statutes which we have to act on were similar to that which governed the company whose affairs were discussed in *Denison v. Lesslie*, 43 U. C. R. 22, 3 A. R. 536, and in *Nasmith v. Manning*, *supra*, there would be no room for plausibly questioning the defendant's liability. The reference to the allotment of shares, on which the question in those cases turned, would be excluded here, both by the form of the contract and by the acts done on the part of the company in entering Kelly's name as a shareholder on their books and giving him abundant notice that he was regarded as a shareholder.

The judgment in appeal ought therefore to be affirmed, were it not for a material difference in the statutes which does not appear to have been pressed upon the attention of the learned judge.

By 45 Vict. ch. 23 (D.) under which these proceedings are taken, contributories of an insolvent company are (sec. 48) declared to be “every shareholder or member of the company.”

The question we have to decide is whether or not Kelly is a shareholder or member of the Standard Fire Insurance Company.

The Alliance Insurance Company was incorporated by the statute 38 Vict. ch. 66 (O.), passed 21st December, 1874.

The first section of that act declared that the persons named in the preamble, "after having complied with the requirements of the act as to subscription of stock, and such other persons as are now or hereafter shall become shareholders of the said company, shall be and are hereby created, constituted, and declared to be a body corporate and politic under the name of "The Alliance Insurance Company."

By section 2 "The stock of the company shall be \$100,000 divided into 1000 shares of \$100 each, which said shares shall be and are hereby vested in the several persons who shall subscribe for the same, their legal representatives and assigns, subject to the provisions of this act: Provided, that the board of directors may increase the amount of the capital stock at any time, or from time to time to an amount not exceeding on the whole \$500,000, but no subscriptions to stock shall be legal or valid until ten per centum shall have been actually and *bonâ fide* paid thereon into one or more of the chartered banks of this province, to be designated by the directors, and not to be withdrawn therefrom except for the purposes of the company."

Kelly subscribed * on 24th February, 1881, but he never paid the ten per cent.

Therefore by the very terms of the statute his subscription was not legal or valid, and he was not one of the subscribers in whom the shares were declared to vest.

I see no way to escape from the force of the declaration which makes the subscription illegal and invalid.

The words of section 2, which are themselves plain enough, are emphasised by the first section, which denies the status of members of the company even to the promoters

*We, the undersigned, do hereby subscribe for — shares of the capital stock of the Alliance Insurance Company, and agree to take the number of shares and for the amount set opposite our respective signatures, and to pay on account thereof to the secretary of the said company ten per centum of the amount of stock, subscribed by us respectively, within thirty days from the date of our several subscriptions.

The second section of the act enacts that the shares shall be *vested in* the several persons *who shall subscribe* for the same, but it goes on to provide "that no subscriptions to stock shall be legal or valid *until* ten per cent. shall have been actually and *bond fide* paid thereon" into one or more of the chartered banks of the province, to be designated by the directors, not to be withdrawn therefrom except for the purposes of the company. To make a valid and complete subscription, and therefore to vest the shares in subscribers for stock, there must be not merely a subscription, but a subscription accompanied with or followed by an actual and *bond fide* payment of ten per cent. thereon. I have considered whether the case was not capable of being brought within the principle of the decision in the *East Gloucestershire R. W. Co. v. Bartholomew*, L. R. 3 Ex. 15.

In that case sec. 8 of the general Act enacted that every person who should have subscribed the prescribed sum or upwards to the capital of the company, or should otherwise have become entitled to a share in the company, and whose name should have been entered on the register of shareholders, should be deemed a shareholder of the company. Sec. 5 of the special act provided that the company should not *issue* any share created under the authority of the act, nor should any share *vest in* the person accepting the same, unless and until a sum not less than one-fifth of the amount of the share should have been paid up in respect thereof.

It appeared that the defendant had subscribed for shares, that the shares had been allotted to him, and that his name had been entered in the register; but he had not paid one-fifth of the amount. It was held that the object of sec. 5, and its true construction was, to quote from the judgment of Bramwell, B. (p. 25): "To protect the public, and to make the concern more solid, and for that purpose to allow no transfer of shares until they represent some actual capital. The word 'issue' is inaccurate as applied to shares, and the only way in which a meaning can be given to it is by supposing it to refer to certificates of shares. * *

Again the word '*vest*' is relied upon, to shew that the de-

fendant could not be a shareholder, no shares having vested in him. My answer is that the shares have not vested in him so as to give him a property, but still he is a shareholder in respect of his having accepted them. For, how can he accept them, unless in some sense they vest in him?"

I think it is most probable that the object of the provision in our act was very much the same as that of the English act, but the language is very different. The one admits of the interpretation that though the party became a shareholder the shares did not vest in him, nor could certificates thereof issue to him so as to enable him to dispose of the shares until payment of the one-fifth. The plain words of the other declare that the subscription for shares shall not be valid or legal until payment of the ten per cent. thereon. Where therefore it is attempted to fix as a shareholder one who is only a subscriber to stock and whose subscription was not accompanied with or followed by payment of the ten per cent. thereon, I am of opinion that such subscriber was not a shareholder in the amalgamated company, and therefore did not become such in the new company so as to be placed on the list of contributories. I express no opinion on the question whether either company had or have any remedy against him upon his subscription, treating it as equivalent to a binding agreement to take shares.

I may refer to *Morton's Case*, L. R. 16 Eq. 104; *Port Dover, &c., R. W. Co. v. Grey*, 36 U. C. R. 425, 434.

This disposes of the appeals in *Barber's Case* and *Copp, Clark & Co.'s Case*. In the latter, it appears from the evidence as reported, and was admitted in the argument, contrary to what is assumed in the judgment appealed from, that nothing was carried to the credit of the subscribers in the books of the company, and consequently there is nothing which can be treated as equivalent to payment of the ten per cent.

Caston's Case stands in a somewhat different position. He not only became a subscriber to stock (I agree that it was not necessary for that purpose that he should actually sign

a subscription list), on condition that he should be appointed the local solicitor of the company, but he was actually appointed as such, and received from the company and retained in his possession for some years a share certificate which states that he is the holder of ten shares on which \$100, or ten per cent., has been paid. This was paid by giving him credit in their books for his charges against the company to that amount for services rendered. He had never repudiated the shares.

We have here therefore the case of one who has agreed to become a shareholder, who by arrangement between himself and the company, has assented to the payment of the ten per cent. in the manner above described, to whom the company has issued and who has accepted a share certificate, which enabled him to deal with the shares as transferable personal estate, and who has accepted the appointment of solicitor which he was to receive as a condition of taking the shares.

In these circumstances it appears to me that each party is estopped as against the other from denying that Mr. Caston became a shareholder, and I am therefore of opinion that he was properly placed upon the list. See *Lindley on Partnership*, p. 134, 135: *National Insurance Company v. Egleson*, 29 Gr. 406.

*Kelly's, Barber's, and Copp, Clark & Co.'s appeals allowed;
Caston's appeal dismissed.*

IN RE THE CORPORATIONS OF THE TOWNSHIPS OF MOULTON
AND CANBOROUGH AND THE CORPORATION OF THE
COUNTY OF HALDIMAND.

*Corporation—Bridge—Repair—Maintenance—Mandamus—Indictment—
46 Vict. ch. 18, sec. 535, (O.)*

An appeal from the judgment of ROSE, J., (not reported) dismissing an application under 46 Vict. ch. 18, sec. 535, (O.,) for a mandamus to compel the repair by the county of Haldimand of an existing bridge or the construction of a new one over the Oswego Creek, where it crosses the boundary line between the townships of Moulton and Haldimand, by reason of the Judges of this Court being divided in opinion, was dismissed.

Per HAGARTY, C. J. O., and OSLER, J. A.—Indictment was the appropriate remedy. The Court below had the right to grant the writ in its discretion, which was, however, properly exercised in refusing it.

Per BURTON and PATTERSON, JJ.A.—The duty under the statute is not the general obligation to keep highways and bridges in repair, but is a specific duty like that cast upon railway companies by their charters with respect to the restoration of roads or the building of bridges. The existence of liability to indictment does not of necessity exempt from compulsion by mandamus any party charged by statute with a specific duty. Indictment would in this case be neither a specific nor an adequate remedy, and a mandamus should have been granted.

The demand made upon the county council previous to the application was sufficient.

Per OSLER, J. A.—The demand was insufficient.

Per Curiam.—The county council were liable for the non-repair of the bridge in question.

AN appeal by the Corporations of the Townships of Moulton and Canborough from the judgment of ROSE, J., (not reported) refusing an application for a *mandamus* to compel the Corporation of the County of Haldimand to build and maintain a bridge.

The facts and authorities appear in the judgments.

The appeal was heard on the 26th September, 1885.

J. K. Kerr, Q.C., and *Snider*, for the appellants.

Aylesworth, for the respondents.

December 23, 1885. HAGARTY, C. J. O.—Conceding for the purposes of this case, that the county council are the parties legally liable to build and maintain a bridge at the

**Present.*—HAGARTY, C.J.O., BURTON, PATTERSON and OSLER, JJ.A.

point indicated, I am still of the opinion that this appeal must be dismissed.

There is a bridge at the point, but it is stated by the applicants to be unsafe, and in bad repair.

An indictment will, under such a state of facts, lie against the defendants, and they will also be liable in damages for any injury thereby caused to life or property.

Indictment is the ordinary and proper remedy, and I am strongly of the opinion that no case is made out for the intervention of the court by the writ of mandamus.

The whole current of authority and precedent seems to run against the application.

There are cases in which the legislature in giving special powers to railway and other companies, have expressly provided in the charter that certain bridges must be of a named height, or the approaches not exceeding a named level, and such like directions, in which the courts have frequently interfered in this summary manner to prevent disobedience to the directions of the legislature.

They will not enter into any discussion as to whether a height of 20 feet above the roadway may not be sufficient for safety or convenience, or whether a grade of 5 feet in the 100 feet would not be as advisable as a prescribed maximum of 4 feet in the 100 feet, but they peremptorily insist on the company obeying the terms of their charter.

If we direct the issue of mandamus in the case before us, there seems to be no reason whatever why a like remedy should not be asked for and granted in the multitudinous cases in which it is complained that a street, road, or bridge may be in deficient repair throughout the province. I think the courts have plainly pointed out the inexpediency and palpable inconvenience of so extending the remedy.

Some of the learned judges in the Supreme Court have expressed themselves in very plain language indicative of a view, that a mandamus should not be granted where there is another remedy or remedy by action: *Grand Junction R. W. Co. v. The Corporation of Peterborough*, 8 S. C. R. 76.

A case cited by Mr. Aylesworth, *Re Nathan*, 12 Q. B. D. 461, decided in 1884, in the Court of Appeal, is very instructive. Bowen, L. J., says, (p. 479) :

“From time immemorial the courts have never granted a writ of mandamus when there was another more convenient, or feasible remedy within the reach of the subject.”

Brett, M. R., (p. 473) cites Lord Mansfield's words :

“‘Where there is no specific remedy the court will grant a mandamus that justice may be done.’ The construction of that sentence is this: Where there is no specific remedy and by reason of the want of that specific remedy justice cannot be done unless a mandamus is to go, then a mandamus will go.”

This is a very recent exposition of the law, and accords with the view that, I think, has for many years governed the decisions of our own courts.

I am unable to see how the decision of this court in *Brooks v. Haldimand*, 3 A. R. 73, can be used as an authority in favour of the appellants, as contended by Mr. Kerr.

In the view I take it is not necessary to decide whether any sufficient demand was made in this case. I would hesitate long before deciding on its sufficiency, or accepting as clear law to govern our courts, the distinction taken in Mr. High's book, sec. 41, between the duties of a public nature, and affecting only the public at large, and those of a private nature specially affecting the right of individuals. He says :

“As regards duties of a strictly public nature, incumbent upon public officers by virtue of their office, and which they are sworn to perform, no demand and refusal are necessary as a condition precedent to relief by mandamus.”

This proposition, if applicable to the present defendants, would seem to require much careful examination.

One of the cases cited of *Commonwealth v. Commissioners of Alleghany County*, 37 Penn. S. C. R. 237, is, I think, very distinguishable.

I do not consider that the case of *Re Township of Augusta and Counties of Leeds, &c.*, 12 U. C. R. 522, can be an authority in the applicants' favor. No such point as is now under consideration was taken or noticed by the court. It] was an application to compel the county to plank, gravel, or macadamize a portion of a road in the plaintiff township, which had been part of a county toll road, and been macadamized and gravelled, and used as a county toll road. The 37th section of the statute 12 Vict. ch. 81, specially required the county to so plank, &c., the road, and the township's jurisdiction over it was to cease, &c.

The court granted a mandamus *nisi*, "in order that any question of law or fact might be raised on the return." It would not be difficult to point out some strong points of difference between the duty there sought to be enforced, and the present case, *e. g.*, the specific duty of "forthwith planking, gravelling, or macadamizing" a road assumed by the county, and an ordinary complaint, as here, of a bridge being out of repair.

I do not question the mere right of the court to award a mandamus in the present case, but I think it was a wise and proper refusal on their part to refuse such a writ.

I am unable to regard the present in any other light than as a case of repair or non-repair. There is an existing bridge in use. The evidence points strongly to its being in bad and insufficient repair.

If the parties, as is suggested, desire to have the question of legal liability settled, I, for my part, at once declare that I consider the county responsible for the maintenance of the bridge in good and sufficient repair, and liable for all damages to life or property arising from its being left in an insecure state, as is alleged.

But I am clearly of the opinion that to interfere on the case made out by the applicants by way of mandamus would be to establish an unwise and highly inconvenient precedent.

I consider the remedy by indictment the appropriate and efficient remedy.

I have examined all the authorities to which we have been referred, and consider that all the cases that appear to favor the application are plainly distinguishable.

BURTON, J. A.—I was inclined during the argument to think that this case was not distinguishable from *Brooks v. Haldimand*, in this Court, but a more careful consideration of the statute has satisfied me that there is a broad distinction between the two cases.

That was not the case of a definite act as to which the functions of the county were merely ministerial. The only ground for the application urged in that case was, that there had already been a bridge erected at that spot by a joint stock company, and although it was the duty of the county council in that case to erect bridges over rivers forming the boundary between townships, there was nothing to make it obligatory upon the company to erect a bridge at this particular spot. There was a discretion vested in the council, and as bridges had already been erected at two points on each side of this spot, it was a question for the council to decide whether there should or should not be another.

The county council, *inter alia*, are declared to have exclusive jurisdiction over all bridges over all rivers forming or crossing boundary lines between two municipalities, and then by section 534 it is enacted that when a county council assumes by by-law any road or bridge within a township as a county road or bridge, the council shall, with as little delay as reasonably may be, cause the road to be planked, gravelled, or macadamized, or the bridge to be built in a good and substantial manner.

And then in section 535 it is further enacted that it shall be the duty of the county council to erect and maintain bridges over rivers crossing boundary lines between two townships, which boundary lines, if not assumed by the county, are, by the next section, to be opened, maintained and improved by the township council, except where it is necessary to erect or maintain bridges over rivers which cross them.

It is plain, therefore, that it is the duty of the townships who are the applicants in this case, to open and maintain the boundary lines on each side of the river, and it is clear also that the county council have exclusive jurisdiction over any bridge over the river connecting them, and that the duty is cast upon the county in terms to erect and maintain such bridge. I cannot bring myself to doubt for a moment that the specific duty thus thrown upon the county is one as to which the duties of the council are only ministerial, and it was never intended by the legislature that after the townships had gone to great expense in opening and making roads, the duty of opening and making of which is cast upon them by law, the work could be rendered comparatively useless by the refusal of the county to make the necessary connection by a bridge.

I propose to deal only with that part of the rule which asks for a mandamus to compel the council to erect a bridge at this spot, as the affidavits filed on the one side, and not denied on the other, shew very clearly that the existing bridge is too far gone to be capable of being repaired, and the council, conceding that, place their refusal upon other grounds, and we are not therefore hampered by any inquiry as to whether this would have been the proper remedy if the application had been merely for a mandamus to put that bridge in repair. All that we are at present concerned with is, whether mandamus is the proper remedy where two township municipalities have opened a boundary line running along the base of the two townships, and apply to the county council to connect them by a bridge.

My brother Patterson has entered so fully into the reasons for holding that this duty is one which can be enforced by mandamus, that I shall content myself with saying that I fully concur in them, supported and confirmed as they are by the changes made at one time by the legislature in declaring that certain things, which were at one time compulsory, should thereafter be permissive, but leaving the obligations created by these sections untouched.

No doubt a mandamus will not be granted where there is another remedy equally convenient, beneficial, and effectual. This, however, is not a rule of law, but a rule regulating the discretion of the courts in granting or refusing the writ: *In re Barlow*, 30 L. J. Q. B. 271. But it is no answer to an application for a mandamus to shew that the defendant may be proceeded against by indictment, unless it is also shewn that an indictment would be a more effectual and suitable course: *Rex v. Severn*, 2 B. & Ald. 646: *Regina v. Bristol Dock Co.*, 2 Q. B. 64; *Regina v. Victoria Park Co.*, 1 Q. B. 288. And many reasons exist in the present case for doubting whether a remedy exists by indictment.

Before the fusion of the courts it was held that where a specific remedy was mentioned in this connection, it meant a specific, legal remedy; not a remedy in equity, for the existence of such a remedy was held to be no answer to the application: *Rex v. The Marquis of Stafford*, 3 T. R. 646, 651.

As to the sufficiency of the demand and refusal, it would be a subject of regret if we felt compelled to give effect to the objection, as it could only result in rendering another application necessary after a more formal demand. I incline to the opinion that in the face of the resolution submitted to the county council at the instance of the townships, requiring the council to have the bridge examined, and, if necessary, to prepare a plan and estimate of a new bridge, followed by an amendment that the sum of \$20,000 be applied in the erection of a bridge, which were rejected, and a resolution adopted that in case any action be taken against the county for not erecting it, Mr. Stevenson, the county solicitor, be retained to defend and to instruct counsel, coupled with the evidence of the solicitor, which is in these words: "That the question of erecting a bridge across the Oswego Creek, on the boundary line between the townships of Moulton and Canborough, in said county, has been before the county council of the said county, at several of its meetings, at which

the said council decided not to build the said bridge, but determined that the liability of the county to build the same, and the question as to whether or not the said creek was a river within the meaning of the word river as used in the Municipal Act, should be decided according to law, and that the erection of the said bridge, in the opinion of the majority of the said council, by the county, would not be in the interest and for the general benefit of the county at large;" it sufficiently appears that there was a distinct refusal to comply with what the council considered a sufficient demand, but the objection is under the circumstances so purely technical, that we ought to hold the parties now taking it, strictly to these rights, and *Regina v. The Eastern Counties Railway Co.*, 10 A. & E. 531, is an authority for holding that no objection can be taken to the sufficiency of the application and refusal after the merits have been discussed; that it was a point which ought to be raised in the first instance. Here the objection was not taken as a preliminary one in the reasons of appeal, and was not so raised in argument as a preliminary one, but the question was fully discussed upon its merits before any allusion was made to it. I think therefore that the parties are precluded from raising it.

I refer also to the extract from Mr. Stevenson's affidavit, for the purpose of shewing not only that the council did not dispute the fact that the bridge was too far gone to be the subject of repair, but that they concede it, and decided to contest purely the question of their liability to build a new bridge, and the further question of whether the stream was a river within the meaning of the Act.

I think the question of whether this is a river is concluded, whether that decision be right or wrong, by the judgment of this court in *McHardy v. Ellice*, 1 A. R. 628.

I agree, therefore, in thinking that a proper case has been made out for a mandamus *nisi*, unless the parties consent to the whole matter being gone into upon the present material.

The appeal should, in my judgment, be allowed, with costs.

PATTERSON, J. A.—The corporations of the townships of Moulton and Canborough, in the county of Haldimand, apply for a mandamus commanding the corporation and council of the county of Haldimand to erect a bridge over a stream called the Oswego Creek, or for a mandamus commanding the last named corporation and council to repair and maintain a bridge now across that creek, where the creek crosses the boundary line between those townships.

The application is founded upon the 535th section of the Municipal Institutions Act of 1883, 46 Vict. ch 18 (O.), which declares that "it shall be the duty of county councils to erect and maintain bridges over rivers, forming or crossing boundary lines between two municipalities (other than in the case of a city or separated town) within the county; and in case of a bridge over a river forming or crossing a boundary line between two counties, or a county and a city, such bridge shall be erected and maintained by the councils of the counties or county and city respectively; and in case the councils of such county and city, or the councils of such counties, fail to agree on the respective portions of the expense to be borne by the several municipalities, it shall be the duty of each council to appoint arbitrators, as provided by this Act, to determine the amount to be so expended, and the award made shall be final."

Only the first part of this section applies directly to the present matter; but I have quoted the whole section because I may by-and-bye refer to the second part as illustrative of the construction proper to be applied to the first part.

The application is supported by a number of affidavits, the purport of which is that the Oswego Creek is a stream of sufficient volume, particularly in the spring and fall, to be called a river, within the meaning of section 535: that it crosses the line between the two townships: that upon the line is a travelled road known as the Robinson Road: that there is across the stream where it crosses the road a

bridge over 200 feet long, which was built more than twenty years ago, of timber and plank, by the county council with county funds, but which is now, from wear and decay, dangerous to travel on, and too far gone to be capable of being repaired : and that a proper bridge would require to be at least 100 feet long after building graded approaches, and of an average height of fourteen feet. One civil engineer says the approaches would be 110 feet long.

The reeves of Moulton and Canborough say that in their character of reeves and members of the County Council, at several meetings of the County Council they requested the council to direct the construction of a new bridge over the creek, but the council refused : each of them says that at the last and previous meetings of the council,—their affidavits are sworn on the 25th November, 1884, a few days before the notice of motion,—he caused to be moved a resolution to have the bridge examined and a report made thereon, and to have plans, specifications, and estimates prepared and submitted to the council for consideration, but the council refused to pass any of the resolutions or take any steps in the matter. The reeves state two other facts ; viz., that the bridge was repaired about a year before their affidavits under the direction of the county council, out of county funds ; and that, in June, 1884, at the general sessions, a bill was preferred against the municipal corporation of Haldimand for suffering the bridge to be out of repair and dangerous, and was ignored by the grand jury, “although,” they add, “it was not denied that the bridge was out of repair and dangerous.”

Now, as the proceedings before the grand jury are *ex parte*, there may be some uncertainty as to what this last statement is meant to convey, and no explanation is given, nor has any been asked for by cross-examining the deponents. I understand the intention to be to allege that an effort was made to indict the county and that it failed because the grand jury, for some reason unconnected with the condition of the bridge, would not find a true bill.

The County Council filed in answer a still larger mass of affidavits.

Most of the deponents speak of the character of the stream. Five or six of them say it is simply the surface water of the country through which it flows, and that there is no spring that feeds it, which would be in hopeless contradiction of the affidavit of the warden, who swears that it takes its real origin in a spring on a farm of his in the township of Seneca, had the statements not been qualified by the cross-examination of five of the deponents. On the whole there does not seem to be any real contradiction on any matter of importance touching the character of the stream, and the fact is plainly enough shewn by the affidavits and cross-examination of either set of witnesses, but more fully by taking them all together, that the creek is, in the time of the spring and fall freshets, the channel of a very large volume of water; that at other times it is a living stream, fed by a number of springs, as well as by water from other sources; becoming of comparatively small magnitude in the driest season, but never being dry; and being affected as far up as the Robinson Road by the water of the Welland River into which it empties, and which is apt to back up the creek.

On the part of the county there is no attempt, either by cross-examination or by counter evidence, to dispute the statements of the witnesses for the applicants, supported as they are by the tenor of the proceedings proved by the council minutes, respecting the state of the existing bridge; but statements and opinions are given with a view to establish that a bridge is not necessary on the Robinson Road, because there are bridges over the stream on parallel roads a mile or so east and a mile or so west of the Robinson Road, bridges made and maintained by the townships, and that these other roads afford all the facilities for travel that can be reasonably asked, and are in fact more important roads than the township line.

It may be remarked respecting these statements generally, that the opinions expressed seem to be influenced by a theory

behalf of, the said townships of Canborough and Moulton, on me as warden of the county, or on the county council to build said bridge."

In reply, the reeves of Canborough and Moulton file affidavits drawn in the same or nearly the same terms. I shall read one paragraph which is identical in each affidavit, because, stress having been laid in argument before us on the alleged insufficiency of the demand, it will be useful to have fully before us what the parties say actually took place.

These gentlemen say, each for himself: "2. I have read the affidavit of Evan Stratford Martin, warden of the county of Haldimand for the year 1884, and his statement that no formal demand has been made on him to have the bridge over the Oswego stream, where it crosses the boundary line between the townships of Moulton and Canborough, built new by the county of Haldimand, is not correct. I did, at the meeting of the county council of the said county, held in the court house, in the town of Cayuga, in the said county, in the month of March, 1884, address the warden and other members of the said council in council assembled, and did ask the warden and the said council to build the said bridge, and I then urged on them the necessity of building the same and the great danger of leaving it in its then and present state. I also demanded the warden and members of the said council in council assembled, in the month of June, 1884, to build the said bridge, and I again urged on them the necessity of building the same and the danger of permitting the present bridge to be used in its decayed condition."

On this topic we have also to note some evidence from the minutes of the county council.

There were notices submitted to the council on 1st October 1883, on behalf of each township, which, though not identical, are both to the same effect. I shall read one of them:

CANBOROUGH, Sept. 29th, 1883.

"To the Warden of the County Council of the County of Haldimand:

"Pursuant to a resolution passed by the Municipal Council of the township of Canborough, I beg to notify you that the bridge across the Oswego Creek, on the division line

between this township of Canborough and Moulton township on the Robinson Road, is in an improper condition, and that this municipality disclaims to repair or rebuild the same, as it is a county bridge within the meaning of the Municipal Act, and furthermore, that this municipality claims the sum of \$300 already expended by them in the repair and rebuilding of the same.

“Your obedient servant,

“JOHN W. BIRDSALL.

“Clerk of the municipality of the township of Canborough.”

On the same first of October it was resolved: “That the warden and Mr. Van Keuren, the reeve of Moulton, have the bridge across the Oswego Creek on the boundary line between the townships of Moulton and Canborough repaired if they think it can be made safe by reasonable repairs; if not, that the executive committee procure the necessary plans and tenders for a new bridge.”

But on the 31st of the following December, the following resolution was carried by a majority of one—ten against nine:—“That the executive committee take no further action in reference to repairing the bridge over the Oswego Creek on the township line between the townships of Moulton and Canborough, or rebuilding the said bridge.”

This last resolution must be the expression of the determination, mentioned by Mr. Stevenson, to test the liability of the county to build or maintain a bridge at the place in question. It was passed soon after the grant of $\$22\frac{50}{100}$ towards repairs, which grant Mr Stevenson tells us was in December, 1883.

Then on 4th June, 1884, a further attempt was made, with the fate shewn by the following minutes:—

June 4th, 1884.

“Moved by Mr. Birdsall, seconded by Mr. Price—That the reeve of Moulton, with the road and bridge committee and the county engineer, be a committee to examine the Oswego bridge on the town line between the townships of Canborough and Moulton, and should the committee decide that it is necessary to build a new bridge, they are hereby authorized to instruct the county engineer to prepare a plan with specifications and estimates of the cost of such bridge as the said committee may on inspection deem suffi-

cient, and submit their report with such plan, specifications, and estimate at the next meeting of this council. Upon which Mr. Davis, seconded by Mr. Stewart, moved in amendment that a special meeting of this council be called to raise the sum of twenty thousand dollars to be applied in the erection of a bridge over the Oswego creek between the townships of Moulton and Canborough, and a bridge over the Grand river at or near the village of York, between the townships of Oneida and Seneca, and repaying the cost of the bridge built last year between the townships of Rainham and Walpole. The amendment being submitted, the yeas and nays were taken thereon as follows: * * Amendment lost. * *

“Original motion lost.”

“Moved by Mr. C. Walker, seconded by Mr. Toohey, and resolved—That in case any action be taken by the townships of Moulton and Canborough against the county for not building a bridge between the said townships at the ensuing sessions of the peace, that this council retain Mr. Stevenson to defend such action with Mr. Colter as counsel.”

One ground strongly relied on against the application is that the appropriate remedy is indictment and not mandamus.

The duty to repair a highway or bridge is in England ordinarily, if not exclusively, enforced by indictment.

The case of *Regina v. The Trustees of the Oxford and Witney Turnpike Roads*, 12 A. & E. 427, is everywhere cited as a direct authority on the point. A mandamus was refused in that case, Lord Denman, C. J., remarking during the argument that he knew of no instance of a mandamus to repair a road; and adding when giving judgment: “If we entertained applications for writs of mandamus in such cases, we might have to try questions of guilty or not guilty on the state of roads, and all questions affecting the liability.”

The questions here spoken of are, I apprehend, questions of fact, because questions of law affecting the liability must always have been decided by the court. The Act of 5 & 6 W. & M. ch. 11, passed nearly two centuries ago, pro-

vided for removing indictments for not repairing any highways, causeways, pavements or bridges, from the Quarter Sessions into the King's Bench, by *certiorari* at the instance of the person or persons charged, when the right or title to repair was shewn to come in question; and though it seems that seven or eight years later the right to the writ was taken away from counties, by 1 Anne ch. 18, it was not taken from a private person or a parish: *Rex v. Hamworth*, 2 Stra. 900.

The English practice has undoubtedly been, as far back as we can trace, to enforce the duty to repair highways by indictment, or in exceptional cases by criminal information.

Whether the same rule would have been applied, as a rule of common law, to compel municipal corporations to keep in repair the roads placed under their jurisdiction by the Act of 1849, 12 Vict. ch. 81, in which our present municipal system was initiated, is a matter which, I believe, was never brought to the test of experiment. But the right to proceed by indictment was a few years later established by statute.

An Act passed in 1850, 13 & 14 Vict. ch. 15, cast upon the councils of cities and towns in both Upper and Lower Canada, the duty to keep in repair the roads &c, within their limits, and declared that their default therein should be a misdemeanor punishable by fine. Under the axiom *expressio unius est exclusio alterius*, it might have been difficult to hold, in the face of the limitation of this statute to cities and towns, that the councils of other municipalities were liable to indictment for misdemeanor in case their roads were suffered to be out of repair.

This statutory liability was, in 1858, extended by 22 Vict. ch. 99 to the councils of all municipalities. The 323rd section enacted that every public road, street, bridge, or other highway in a city, township, town, or incorporated village should be kept in repair by the corporation, and that the default of the corporation so to keep in repair should be a misdemeanor punishable by fine in the discretion

of the court, and that the corporation should be further civilly responsible for damages, &c.

The same provisions were repeated in C. S. U. C. ch. 54 sec. 337, and in the act of 1836, 29 & 30 Vict. ch. 51, sec. 339.

When, after confederation, the laws relating to municipal institutions in the province were re-enacted, in 1873, by 36 Vict. ch. 48 (O.), the legislature was careful to avoid enactment of a provision which might seem to pertain to the criminal law over which the dominion parliament had exclusive jurisdiction, and therefore, in section 409, varied the form of the enactment by declaring that "on default of the corporation so to keep in repair, the corporation shall, *besides being subject to any punishment provided by law*, be civilly responsible for all damages &c."

The same words are retained in the present act of 1883, 46 Vict. ch. 18 sec. 531 (O.).

It may be worth while to notice, in passing, that while the act of 1858 applied to all municipalities the law which, by the act of 1850, governed only cities and towns, it expressly repealed the earlier act, so far at all events as it affected Upper Canada: 22 Vict. ch. 99 ss. 403, 410.

In the schedule B. to the Consolidated Statutes of 1859 the Act is noted as repealed; and yet it happens to have found a place, as if still in force, among those statutes, where it forms C. S. Can. ch. 85, and two of its sections are printed in small type under section 491 of R. S. O. ch. 174, and under the corresponding section, 531, of the act of 1883.

The decision in 1859 in the *Port Whitby, &c., Road Co. v. The Corporation of Whitby*, 18 U. C. R. 40, turned on the effect of 13 & 14 Vict. ch. 15, apparently without the attention of the court being directed to the repeal of the Act in the preceding year. This was noticed in *Regina v. Brown*, 13 C. P. 356, decided in 1863, where however nothing is said of the circumstance that the act had re-appeared in the Consolidated Statutes. The question in

those cases was not the same as any question now before us. The two courts differed in opinion, and the question came again in 1871 before the Court of Error and Appeal in *The St. Catharines, &c., Road Co. v. Gardner*, 21 C. P. 190. Mr. Justice Gwynne there suggested (p. 208) that the Act may have been retained in the Consolidated Statutes of Canada because it remained in force as to Lower Canada, but the decision of the case then in judgment did not make it necessary to form an opinion whether or not it was revived with regard to Upper Canada. He seems (p. 211) to have regarded that as an open question.

The act of 1873 only repealed former laws when they were inconsistent with its provisions, and thus apparently left untouched the express enactment of the act of 1866 which made failure to discharge the duty to repair highways a misdemeanor. But the whole of the act of 1866 was included in the schedule A. to the Revised Statutes amongst the acts which, by 40 Vict. ch. 6, sec. 6, were repealed; and although it was declared by 40 Vict. ch. 6, sec. 7, that such repeal should not be construed as intended to extend to such of the provisions of the acts as related to subjects in regard to which the parliament of Canada had exclusive powers of legislation, which saving clause would probably have left standing the express designation of indictment as a remedy for breach of the statutory duty of the corporation to repair the highways; yet inasmuch as by reason of this repeal of the act of 1866, the duty came to depend on the act of 1873 alone, or rather on the revised statute which took its place, it could no longer be said, with strict accuracy, that the liability of the corporation to be indicted for misdemeanor was a statutory liability.

There was no difficulty in 1873 in referring the phrase, "the punishment provided by law," to the provisions of section 339 of the act of 1866, which, not being inconsistent with any thing contained in the act of 1873, remained unrepealed; but the phrase as used in the revised statute and in the act of 1883, could not so easily be explained by

reference to any statute which at those dates continued in force.

The clauses from C. S. Can. ch. 85 being printed as they are in the revised statute and in the act of 1883, the inference that the reference is to the punishment provided by them would not be an unnatural inference, and would be capable of militating against the recognition of any corporations except those of cities and towns as exposed to proceedings by indictment.

But inasmuch as the sections to which the extracts from chapter 85 are appended deal with all corporations and speak of them all as liable to punishment, it will probably be more correct to say that while the legislature of the province of Canada expressly established the punishment by indictment as a mode of enforcing the general duty cast upon all municipal corporations to keep their roads in repair, the legislature of Ontario has recognised that process as still appropriate.

There are, I think, reasons for hesitation before accepting the opinion that, without the aid of the statutes of 1850 and 1858, an indictment could have been sustained. But those statutes combined two things, both of which were new features in our legislation. They declared that the roads, &c., should be kept in repair by the corporations, and then added the other declaration that default should be a misdemeanor.

They thus adopted, as fitted for the enforcement of the duty cast for the first time by express legislation upon our municipal bodies, the remedy already applied, in cognate circumstances, in the English communities, and the same consequence follows here as there, that the performance of the duty will not as a general rule be enforced by mandamus.

The rule, of course, applies to county councils as well as to the councils of other municipalities, when the duty arises from the same general enactment.

Section 532 of the act of 1883 declares that the county council shall have exclusive jurisdiction over all roads and

bridges lying within any township &c. and which the council by by-law assumes, with the assent of such township &c., as a county road or bridge, until the by-law has been repealed; and over all bridges across streams separating two townships; and over all bridges crossing streams or rivers over 100 feet in width within the limits of any incorporated village and connecting any highway leading through the county, and *over all bridges over rivers forming or crossing boundary lines between two municipalities.*

It cannot be successfully contended that the Oswego Creek is not what this section calls a river. We had occasion in the case of *McHardy v. The Township of Ellice*, 1 A. R. 628, to point out that in these statutes the words "stream" and "river" are used interchangeably, as they happen to be in this very section. His Lordship the Chief Justice discussed the use of these terms very fully, and I may now repeat the language in which my own opinion was expressed, I said (p. 644): "I think the duty, while confined to what is not improperly called a river, attaches wherever the road is crossed by a stream which requires a bridge, as distinguished from a mere culvert, in order to make the road fit for ordinary travel."

The description given of this Oswego creek by deponents on both sides, shews it to be a river with a bed of at least sixty feet wide. The fact that in the dry season it may not contain much water does not deprive it of the character of a river. There is no attempt made to shew that the highway can be carried over it by any kind of structure that will not be a bridge, and a bridge of very considerable length and height. On the contrary one great point made by affidavits filed for the defence is that it is already crossed by several bridges on other roads.

The bridge then, if there be one, across the Oswego creek on the Robinson road, is clearly placed by section 531 within the exclusive jurisdiction of the county council; and, without any further enactment than the prescription by section 531 of the general duty to keep the highways and bridges in repair, the responsibility for keeping the bridge in repair is thrown upon the county council.

To this extent the relation of the county council to the roads and bridges mentioned in section 532 is the same as that of other municipalities to the roads and bridges under their jurisdiction.

The corporations are all alike within the terms of section 531, and the rule by which they are liable to punishment by indictment for neglect to keep in repair, and by consequence, not liable to proceedings by mandamus for the enforcement of the general duty, applies to all alike.

But there are two other sections (534 and 535) which apply only to county councils, and which seem to impose duties of a more specific character, and not to be intended merely to declare the general duty to keep in repair which results from the enactments I have been noticing, which general duty admits and requires a very wide range of interpretation according to the locality of the road or the circumstances of the municipality with respect to which it is asserted. I have not been convinced that we are bound, either on principle or by authority, to hold that these more specific duties may not properly be enforced by mandamus.

We are immediately concerned with section 535. I have read it.

The argument for the county against the present application makes the section, so far as it declares it to be the duty of county councils to erect and maintain bridges over rivers forming or crossing lines between two municipalities, nothing more, in effect, than a repetition of section 532

The language employed, "*It shall be the duty*" &c., does not occur in any of the other sections in which the general liability to keep roads in repair is dealt with. I refer to such sections as 530, 531, 532, 536, 537, 538.

It would have been unnecessary to add the section to the previous section 532, and still more so to adopt the more imperative phraseology, if nothing more were intended than that these portions of the highways were to be kept in repair by the county councils in the same

sense, and subject to the same discretion, which applied to all highways and all municipalities.

The character of the duty enjoined may suggest one reason for making its discharge imperative. Where the townships perform the task of opening the road and making it fit for travel till it reaches the river, (and I take to be a matter of course that the duty is to bridge rivers only when the boundary line is an opened road) it would seem only reasonable that the county should be required to complete the link without which there would be a gap in the highway.

I understand the two sections 534 and 535 to be strictly *in pari materia*. Between them they deal with every one of the subjects brought by section 532 under the jurisdiction of the county council, and they might, so far as I can perceive, have formed one section instead of two, but for an apparent design to let the directions respecting boundary lines form a separate group, as they do in section 535.

But though the subjects are thus treated in two groups in place of one, I see no reason to suppose that the same policy was not intended to be applied to them all.

The first part of section 534 enacts that when a county council assumes, by by-law, any road or bridge within a township as a county road or bridge, *the council shall* with as little delay as reasonably may be, and at the expense of the county, cause the road to be planked, gravelled, or macadamized, or the bridge to be built in a good and substantial manner.

These are the same provisions and in almost the same language, found in the act of 1849, 12 Vict. ch. 81 sect. 37. It was there said that, "*It shall be the duty* of such municipal council, *and they are hereby required*, with as little delay" &c.

The phraseology was cast into its present form—"the council shall, with as little delay" &c—in 1858, 22 Vict. ch. 99, sec. 326, but without, as I apprehend, any intention to alter its effect.

I shall presently notice the case of *Re Augusta and Leeds and Grenville*, 12 U. C. R. 522, which was decided on the effect of sec. 87 of the act of 1849.

The second part of section 534 reads thus: "and further the county council shall cause to be built and maintained in like manner all bridges on any river or stream over 100 feet in width, within the limits of any incorporated village in the county, necessary to connect any public highway leading through the county."

We first find this provision in 34 Vict. ch. 30 (O.), passed in 1871. That act amended sec. 341 and 342, of the act of 1866, (which are now represented by sections 534 and 535) by adding to section 341, which gave jurisdiction to the county council over certain roads &c., the words, "and over all bridges crossing rivers, over 500 feet in width, within the limits of any incorporated village in the county, and connecting any highway leading through the county." That gave the county council jurisdiction. At the same time, the obligatory section 342 was also amended by adding words like those in section 534: "and further the county council shall cause to be built" &c., referring to rivers over 500 feet wide, and giving power to charge tolls to defray expense of making and repairing the bridge.

In 1873, 200 feet was named as the minimum width of a river in a village which the county should bridge, and the reference to tolls was dropped; (36 Vict. ch. 48, secs. 410, 412); and in the following year those sections were amended by reducing the named width to the present minimum of 100 feet. (37 Vict. ch. 16, secs. 17, 18.)

Now having regard to the purpose of these bridges, viz., to connect highways running from the village into the county, and to the fact that the jurisdiction over them was not conferred without being accompanied with a mandate to build and maintain them in a good and substantial manner, the intention to make that duty imperative on the county council and not to leave it discretionary is I think very plain. If we may reason from the connection in which it is placed, forming part of the same clause, and indeed

of the same sentence, with the mandate to cause a township road when assumed by by-law to be planked, gravelled, or macadamized—a mandate which plainly leaves no option in anything but the mode of doing the work—the peremptory character of the enactment is further enforced.

The same reasoning may be applied to the duty to connect township roads by bridges over streams forming or crossing the boundary lines. In addition to which we have from the legislature itself other indications of the peremptory character intended to be attached to the terms in which the duties are imposed by section 535.

We have the phrase “it shall be the duty,” which, as I have already remarked, is peculiar to this section.

Then, if we turn to the act of 1866, 29 and 30 Vict. ch. 57, in which the provision I am discussing originated, we find under section 341 twelve sub-sections.

In at least four of these we find the expression, “It shall be the duty” &c.

These four are 4, 5, 9 and 12. Sub-section 12 is the same as the first part of the present section 535, except that streams *crossing* boundary lines were not then included.

Did the legislature understand the words, “It shall be the duty” as merely defining the jurisdiction, or as conveying a peremptory mandate?

That the latter was understood and intended, appears from the act 33 Vict. ch. 26, sec. 16, (O.), passed after confederation, where it is enacted: “That sub-section four of section 341 of the said act, ch. 51, shall be and the same is hereby made permissive.”

There is no such declaration as to sub-section 12.

The writ of mandamus is granted in all cases where there is no specific, legal, or adequate remedy; *Gude's Crown Prac.* 180.

If I am right in my opinion that the duty now in question is not the general obligation to keep highways and bridges in repair, to which the punishment by indictment was attached by the legislature, and under which the corporation would be liable in damages to a person injured in

person or property by reason of want of sufficient repair, but a specific duty to do a definite thing, namely to provide a bridge across this river, I think it follows that indictment is neither a specific nor an adequate remedy.

It is true that the corporation might be indicted under the general law of the dominion, which declares that "any wilful contravention of any act of the legislature of any of the provinces within Canada, which is not made an offence of some other kind, shall be a misdemeanor, and punishable accordingly," (31 Vict. ch. 71 sec. 3, c.—) but to secure a conviction the disobedience must be wilful. An honest dispute as to liability, whether on the ground that the creek was not a river, or that the necessity for a bridge was to be decided by the county council alone, would probably defeat a criminal prosecution under the act just cited; but, unless well founded in law, would be no answer to a rule for a mandamus.

But, apart from considerations of this kind, the reasons given by Abbott, C. J., and Best, J., in *The King v. The Severn and Wye R. W. Co.*, 2 B. & Ald. 646, are apposite. Abbott, C. J. said: "I have entertained considerable doubts during the discussion, whether the court ought to grant a mandamus to compel the doing of an act, the omission to do which may be prosecuted by indictment. I am now, however, satisfied by the authorities cited in the course of the argument, that there is no reasonable ground for that doubt. If an indictment had been a remedy equally convenient, beneficial, and effectual as a mandamus, I should have been of opinion, that we ought not to grant the mandamus; but I think it is perfectly clear, that an indictment is not such a remedy, for a corporation cannot be compelled by indictment to reinstate the road. The court may, indeed, in case of conviction, impose a fine, and that fine may be levied by distress: but the corporation may submit to the payment of the fine, and refuse to reinstate the road; and at all events a considerable delay may take place. The remedy, therefore, is not so effectual as that by mandamus. I am, therefore, of opinion, that the circumstance of the corporation being liable to an indictment, is no objection to the granting of a mandamus."

One of the authorities to which the Lord Chief Justice alluded was *The King v. The Commissioners of Dean Inclosure*, 2 M. & S. 80, in which Lord Ellenborough seems to have entertained the same opinion, although the mandamus was refused on the ground of delay in making the application.

In *Rex v. The Commissioners of Llandilo*, 2 T. R. 232, which was an application for a mandamus to erect a wall on each side of a road, the liability was disputed and it was also objected that the remedy was by indictment. The judgment refusing the writ was put on the former point only, nothing being said as to the latter.

The same distinction which in my opinion exists between the general and ordinary duty to keep roads in repair under our statute, and the specific duties enjoined by sections 534 and 535 upon county councils, will be found between such cases as *Rex v. The Severn and Wye R. W. Co.*, and cases like *Regina v. The Trustees of the Oxford and Witney Turnpike Roads*. The recognition of the distinction is implied by Lord Denman's remark in the latter case that he knew of no instance of a mandamus to repair a road. That was the nature of the application before him. In the case in 2 T. R. the writ was asked to compel the building of walls; in the case in 2 M. & S. it was to set out a road; and in the case in 2 B. & Ald. it was to reinstate a road which had once existed but had been closed.

A remark made by Lord Denman in *Regina v. Gamble*, 11 A. & E. 69, is sometimes referred to as intimating disapproval of the principle on which *Rex v. Severn and Wye R. W. Co.* was decided. I do not so understand it. The conservators of Bedford Level had obtained a rule *nisi* for a mandamus to certain landowners to repair portions of the bank of the river Ouse. Counsel, in shewing cause, argued that, assuming that there was a remedy by presentment, it was not so beneficial as mandamus, and therefore the writ ought to go, citing the *Severn and Wye R. W. Co. Case*. Lord Denman then said: "I think the danger here

would be better met by the other remedy than by mandamus. I believe it is generally thought that the decision in *Rex v. The Severn and Wye R. W. Co.* went quite far enough." I do not see in this anything more than an expression of opinion, which may have been Lord Denman's opinion, though he did not say so, that the decision ought not to be extended to a case of mere non-repair. It will be observed that his lordship, in the same remark, put, as a criterion, the comparative efficacy of the two remedies, which was just what had been done in the case cited to him, although his leaning was in favor of presentment; and that the matter was not disposed of on that ground, but after a *cur. adv. vult.*, the rule was discharged because the conservators had, by statute, a remedy in their own hands.

Then we have in the following year the case in 12 A. & E., where the remark of Lord Denman that he knew of no instance of a mandamus to repair a road, shewed that he did not place the *Severn and Wye R. W. Co. Case* in that class.

A year later a mandamus was refused in *Regina v. The Victoria Park Co.*, 1 Q. B. 288, to command the company to pay a sum of money for which judgment had been recovered and execution issued, but no goods found. Lord Denman there explained and fully adopted the principle of the decision in discussion. He said (p. 291): "It was argued that we have issued the writ, even when there was a legal remedy, in cases where that remedy was not so complete and beneficial as the writ would enforce. But that has been where the remedy at law was not *in its nature* so complete, without reference to any circumstances peculiar to the case in which it was to be used, as in *Rex v. The Severn and Wye R. W. Co.*, where a mandamus was granted to compel a corporation to reinstate and lay down a railway, although an indictment would have lain for the non-repair; for the only direct effect of the indictment would have been the punishment of the defendants by fine, and not procuring for the prosecutors the benefit which they sought and were entitled to." It may be noted that the railway here spoken of was expressly held to be a public highway, though one which the public had to use in a

particular mode ; per Holroyd and Bayley, JJ., 2 B. & Ald. 648.

I may refer also to Lord Denman's judgment in *Regina v. Bristol Dock Co.*, 2 Q. B. 64, though it is not a highway case. In giving judgment for a peremptory mandamus to repair and maintain parts of the bank of the channel of the river Avon, he said (p. 70): "On argument, objection was taken to the writ, because it only enjoined the doing that for omitting which the company are liable to indictment. But we think, even if such an objection did not come too late after the writ has issued, that it is entitled to no weight. Those who obtain an Act of Parliament for for executing great public works are bound to fulfil all the duties thereby thrown upon them, and may be called upon by this Court so to do. If this breach of the contract causes a public nuisance also, that cannot dispense with the necessity of a specific performance of the obligation contracted by them."

I think the duty of the council under the enactments we are considering, is less analogous to the general liability to keep highways in repair, than to those duties cast upon public companies, such as railway companies, by their charters or by acts of parliament, with respect to the restoration of roads or the building of bridges, which have always been enforced by mandamus.

One instance is *Regina v. Birmingham, &c., R. W. Co.*, 2 Q. B. 47, in which the turnpike road, carried over the railway, was to be restored to its former width. A mandamus was granted to make the approaches to the bridge the full width of the road ; and the case of *Regina v. The Wycombe R. W. Co.*, L. R. 2 Q. B. 310, will be found instructive, the report giving the return to a mandamus to compel the company to restore a highway which had been diverted and to carry it over the railway by a bridge, together with the proceedings and judgment upon the question of the liability of the company.

I do not think it necessary to occupy time by referring to others of the numerous cases on the subject, and I do not profess to have examined them all. I take it to be the

law and to be clearly apparent from the cases I have referred to, that the existence of liability to indictment does not of necessity exempt from compulsion by mandamus any party, whether an individual or a corporation, who is charged by statute with a specific duty, even though that duty may relate to the making or maintaining some part of the public highways; and for the purpose of our present investigation I do not consider the general obligation to keep existing roads in repair such a specific duty, notwithstanding that it may be imposed by statute.

In considering the adequacy of the remedy by indictment in comparison with that by mandamus, it is, I think, proper to bear in mind that under our legislation, now found in R. S. O. ch. 52, the proceeding by mandamus is simpler and less cumbrous and expensive than in former times; and that it possesses the advantage, the absence of which in some cases of indictment was pointed out by his lordship the Chief Justice in *Regina v. Yorkville*, 22 C. P. 431, of admitting of review by the Court of Appeal and the Supreme Court.

The present Chief Justice of the Queen's Bench suggested, in *Brooks v. Haldimand*, 41 U. C. R. 381, a doubt whether an appeal lay when the court entertained a motion for mandamus in the first instance, and not by way of appeal from a judge in chambers under 35 Vict. ch. 14 (O.), which gave power to judge in chambers to grant the writ, and made his decision appealable to the full Court, with a further appeal to the Court of Error and Appeal. The uncertainty was removed by the provision contained in R. S. O. ch. 38 sec. 18 (b), which had been enacted before the delivery of the judgment, by 40 Vict. ch. 7, but only came into force on 31st December following, as part of the revised statutes.

Part of the argument of the master of the rolls in *Re Nathan*, 12 Q. B. D. 461, in favor of petition of right as against mandamus, founded on the simplification of procedure by modern legislation, will, *mutatis mutandis*, apply in this case, in favor of mandamus as against indictment.

In *Tapping* on Mandamus it is pointed out that "procedure by indictment does not terminate the question, for it may be delayed by certiorari, and the prosecutor is not entitled to costs from the county; whereas a mandamus is a *festinum remedium*, and the court has a discretionary power as to the costs by statute." (p. 25.)

We have in this province (R. S. O. ch. 52,) not only assimilated the proceedings on mandamus to ordinary actions, as was done in England by 6 and 7 Vict. ch. 67, and the Common Law Procedure Act, 1854, but have gone still further towards making the remedy simple and convenient; while they have in the Imperial legislation given more attention than has been given in this country to the regulation of matters connected with proceedings by indictment for non-repair of highways, such as the costs of the prosecution, appropriation of fines &c. See 5 & 6 Wm. IV. ch. 50; 25 & 26 Vict. ch. 61, and as to turnpike roads, 3 Geo. IV. ch. 126.

Under these statutes all fines for non-repair are applied to the repair of the highways &c.; but from early times it seems that fines on indictments were always so expended, which under the English system, must have tended to make indictment something more of a specific remedy than it is with us. See *Rex v. Steyning*, Sayer's Rep. 92, cited *arguendo* in 10 Q. B. at p. 830.

One of the earliest, if not the very earliest of the decisions on the subject before us, in our own Courts, is the case of the *Township of Augusta v. The United Counties of Leeds and Grenville*, 12 U. C. R. 522. It was in 1855, and therefore before the statute of 1858 had declared that roads should be kept in repair by the corporations, and had attached to default the penalty of indictment. A mandamus *nisi* was granted to enforce the duty, under 12 Vict. ch. 81, sec. 37, to plank, gravel, or macadamize a road assumed by the county council. Sir J. B. Robinson delivering the judgment of the court said: "We do not at present see that there is not a duty plainly incumbent upon the United Counties of Leeds and Grenville, under the statute

12 Vict. ch. 81, sec. 37, to make the road which they are desired to make * * If the defendants should appear to be without any legal excuse for not proceeding with the road, then the case would be one of a duty imposed by act of parliament remaining unperformed. And if there should appear to be nothing unreasonable in insisting upon performance, why should it not be enforced? It could only be on account of some difficulty in extending the remedy by mandamus to a municipal body, and in rendering it effectual. At present we do not see that there is such difficulty when there appears to be no other remedy. But we think it clearly proper that we should award only a mandamus *nisi* at present, in order that any question of law or fact that may be raised upon the return may be disposed of formally and subject to revision."

The learned Chief Justice's allusion to the absence of any remedy except by mandamus may indicate an opinion that the English practice of proceeding by indictment was not, without legislative adoption, applicable to our corporations, or he may have thought that indictment was not a specific or adequate remedy, even if appropriate.

In either case I take the decision to be important authority for the views I have been maintaining. The propriety of interfering by mandamus is considered and affirmed. The grant of a mandamus *nisi* and not a peremptory writ does not imply any reservation of opinion on that point, as is apparent from what was said as the reason. I do not understand that the question could regularly be raised on the return of the writ. *Regina v. Bristol Dock Co.*, 2 Q.B. 64, is an authority to the contrary, and the rule is distinctly stated by Smith, J., in *Re Nathan*, 12 Q. B. D. 461, at pp. 465-6; though perhaps *Regina v. Haldimand*, 20 U. C. R. 574, in which case a mandamus was quashed after return, on the ground that there was a remedy by indictment, may not be quite consistent with those authorities. See also *Regina v. Powell*, 1 Q. B. 352; and *Regina v. Mayor of Stamford*, 6 Q. B. 433.

Nor do I gather from the cases in our own reports that the views I have been putting forward as to the remedies for the statutory duties in discussion are novel.

The mandamus which, in *Regina v. Brown*, 13 C. P. 356, was refused on the authority of *Regina v. The Trustees of the Oxford and Witney Roads*, was asked to compel the repair of a road.

So was that which was the subject of *Regina v. Haldimand*, 20 U. C. R. 574.

In *Kinnear v. Haldimand*, 30 U. C. R. 398, the rule for a mandamus to erect and maintain a bridge over the Grand River at the village of Indiana, was discharged on the ground that the obligation to build a bridge across the river at that particular place was not made out. Nothing is reported as having been said, either at the bar or from the bench, to suggest a doubt of mandamus being the appropriate remedy.

Jamieson v. Lanark, 38 U. C. R. 647, is open to the same remark as *Regina v. Brown*; and *Brooks v. Haldimand*, 41 U. C. R. 381, 3 A. R. 72, presented the same features as *Kinnear v. Haldimand*. There was no suggestion in that case, either in the Queen's Bench or in this court, that the applicants ought to have sought their remedy by indictment in place of by mandamus. In the Queen's Bench a majority of the court thought that the writ ought to issue. The dissentient judgment, with which in this court we agreed, was that of Chief Justice Harrison, who had refused the writ in *Jamieson v. Lanark*, but who gave no reason to suppose that he thought the proceedings in *Brooks' Case* open to the objection on which he acted in *Jamieson's*.

The result of the best consideration I have been able to give to the matter is that, for the reasons I have attempted to explain, the duties declared by these sections, 534 and 535, may properly be enforced by mandamus, provided the court "be of opinion that the case is a proper one for the issue of the same." (R. S. O. ch. 52 sec. 18.)

Is this a proper case?

The uncontradicted evidence before us is that, practically, there is no bridge. Although a bridge was erected, it has not been maintained, because it is so far gone as to be impossible to repair; and a new bridge is required.

I see no good reason for entering upon a speculation as to how far the word "maintain" includes all those ordinary repairs that it may be necessary or prudent to make in order that the bridge may be kept reasonably safe, and accidents avoided for which the county, under sec. 531, would be liable to pay damages, and for neglecting which an indictment might be preferred even though the neglect stopped short of allowing the bridge to become absolutely ruinous.

I take the word to be used in section 535 in a broader sense, the duty being to maintain communication by means of a bridge between the parts of the highway on the opposite sides of the river. The word "maintain" would, on this understanding of it, include the duty to build a bridge, although for greater certainty the duty is expressed to be to erect and maintain—that is to build a bridge when there is no bridge, and to restore or rebuild it, when from ordinary decay, or casualty by fire or flood, it ceases to be a bridge.

That is the case made out by the present applicants and not disputed on the part of the county.

The main dispute relates to the liability of the county, on whose behalf it is contended that the Oswego Creek is not a river.

That element of liability can conveniently be decided in this manner. The decision of it ought to precede the granting of a mandamus *nisi*, and having regard to the facts shewn on both sides, it is already decided by the case of *McHardy v. Ellice*, 1 A. R. 628.

This dispute as to the reasonableness of the demand for a bridge at this place, or, what strikes me as the same thing, the reasonableness of the decision of the townships to maintain a travelled road on this boundary line in view of the requirements of the locality, can scarcely, if seriously persisted in, be satisfactorily tried upon affidavits. It would be a proper subject to present by the return to the writ, together with other matters of excuse, if any there be, on the score of the circumstances of the county or otherwise; and any questions so raised would be tried in the same way as other issues of fact. Still, matters of this kind have been

discussed and dealt with in some of our cases on the argument of the rule for a mandamus, though perhaps there is no instance, except the judgment of the Queen's Bench in *Brooks v. Haldimand*, in which the court actually granted the writ upon its own view of the conflicting affidavit evidence.

If the parties so desired, the court would probably not refuse to take that course, and dispose of the whole matter.

From what took place in the county council, as shewn by the minutes in evidence, I gather that the desire was to have the question of liability settled, and that besides the denial that this creek was a river, which I imagine was not a matter of which, in council, any question was made, the position was taken that the necessity or reasonableness of the maintenance of the bridge was to be tested by the general requirements of the county at large and not by those of the locality. In *Brooks v. Haldimand* Mr. Justice Wilson expressed his opinion that the rights and interests of the public generally, and not those of the county only, were to be regarded, and that the statute contemplated that more extended duty. His remark was, of course, primarily addressed to the case of the bridge over the Grand River. I do not at present see my way to ascribe so extensive a scope to the intention of the statute; but I agree that the general needs of the county cannot be taken to be the measure of the liability. I regard the bridge as a part of the particular highway. The necessity for the highway and the extent of the work to be done upon it, must be judged by the well established rule which looks at the matter in the light of the circumstances of the neighborhood where the road is.

A passable road may be an absolute necessity in a new settlement, in the interests of the settlers there, while it may be of no consequence whatever to other parts, and even to the greater part, of the county whether there is such a road or not. There would be a defect in the law, if while it declared it to be the duty of the county council to bridge a river crossing such a road, and excluded the town-

ships from all jurisdiction over bridges so situated, it left the right to have a bridge to depend upon the view adopted by a majority of the council as to the importance of the bridge to the county at large.

I do not think that is a fair deduction of the intention of the legislature.

These questions could undoubtedly be raised and tried upon an indictment; but they may very well be settled in the present proceeding without driving the applicants to renew the attempt in which, before making this application, they failed, to induce a grand jury of the county to present the county. From that experience they may reasonably fear that the refusal of the writ will be tantamount to a denial of justice. In *Regina v. Upton St. Leonards*, 10 Q. B. 827, two bills had been preferred for non-repair of a road against two parishes whose liability to repair was disputed. The bills were ignored by the grand jury. Two gentlemen of the grand jury were proprietors of land in the parishes, and were said to have taken an active part in opposing the finding of the indictments, though on the other hand it was denied that they had done anything unusual. One of them appeared to have said to the foreman of the grand jury that the road was perfectly useless. The court made absolute a rule for leave to file a criminal information against the inhabitants of the two parishes in place of proceeding by indictment. This case is an instance of a proceeding otherwise than by indictment, though a cognate proceeding, for non-repair of a road, and is not without bearing as an authority, if one were required, for our disposing of the questions which appear to be those in dispute, without insisting on the necessity of the complaint being again preferred before a grand jury, the result of which, even if a true bill were secured, would be in the end to bring the same questions before the court for decision. See the judgment of Jessel, M. R., in *Salt v. Cooper*, 16 Ch. D. 544.

These questions should in my opinion be settled in favor of the contention of the townships.

It is, I venture to think, likely that the decision of them would practically end the present controversy, and that whatever scruples may have prevented the action of the county council towards the restoration of this bridge will be removed by the knowledge that the bridge is one of those contemplated by sections 532 and 535, and that the duty to erect and maintain it is absolute, provided the township line is maintained by the townships as a travelled highway, and provided it is reasonably necessary for the requirements of the locality that there should be such a road.

An objection is also made to the sufficiency of the demand for the performance of the duty in question.

This objection, though of a technical character, must prevail if well founded.

Mr. Kerr argued, upon the authority of some passages from *High on Extraordinary Remedies*, that when the duty charged is of a public nature and which ought to be performed, as of course, by public officers as part of their official duty, no demand is required, as it is when the duty is owed to some individual. Assuming the distinction to exist, I do not think this case comes within the class of public duties referred to. But further, I look upon the townships as the parties interested in the performance of the duty, and therefore bound by the ordinary rule to distinctly demand performance.

It is with some hesitation that I hold that there has been in this case a sufficient demand. But bearing in mind what is shewn to have occurred at the regular meetings of the county council, where the reeves of both townships distinctly urged the action now insisted on, and particularly having regard to the formal resolutions of the council which put the refusal in the clearest terms, and left no doubt of the full understanding of what was required, I think the better opinion is that the county council ought not to be allowed to insist on a demand in any more formal shape. To quote the language of Lord Denman in *Regina v. Brecknock &c. Canal Co.*, 3 A. & E. at p. 222. "It is not

necessary that the word 'refuse' or any equivalent to it should be used; but there should be enough to shew that the party withholds compliance, and distinctly determines not to do what is required." Such a distinct determination with full knowledge of what was required, has I think been shewn.

What is required and demanded is that the county council shall maintain the bridge as directed by section 535. The council denying the liability of the county, refuse to maintain the bridge. In *Regina v. Bristol Dock Co.*, 2 Q. B. 64, we have a precedent of a mandamus to *maintain*. In that case it was to *repair and maintain*.

My conclusion is that a mandamus ought to issue. If the county council so desire, I see no reason why it should not be a mandamus *nisi*; nor should I object, if it is the wish of the council, to defer the issue of the writ for a reasonable time to give an opportunity for taking action towards the performance of the work.

I think the appeal should be allowed, with costs.

OSLER, J. A.—I think it sufficiently appears that the bridge in question is a public bridge in a highway, and also that it is a county bridge, that is to say, a bridge which, under sections 532 and 535 (as amended) of the Municipal Act, 1883, the county was bound to erect, and is bound to maintain as being a bridge over a river crossing the boundary line between two municipalities.

This bridge then having become out of repair, an application was made to my brother Rose on behalf of the two municipalities in question to direct the issue of the prerogative writ of mandamus, commanding the county to erect a bridge at the *locus in quo*, or, in the alternative, to repair the existing one. I think the learned Judge exercised a proper discretion in refusing the application.

Brett, M. R., in *In re Nathan*, 12 Q. B. D. 461, says (p. 473):

"The rule governing the discretion of the Queen's Bench Division seems to me to have been clearly laid down by Lord Mansfield in *Rex v. Bank of England*, 2 Doug. 524.

There he says, 'When there is no specific remedy the Court will grant a mandamus that justice may be done.' The construction of that sentence is this, Where there is no specific remedy and by reason of the want of that specific remedy justice cannot be done unless a mandamus is to go, then a mandamus will go."

Here, for the breach of the alleged public duty, a specific remedy exists, that namely by indictment, which is the appropriate remedy for the nuisance caused by allowing a public bridge or highway to be in disrepair: *Russell* on Crimes, book 2, ch. 28, sec. 4; *Regina v. Corporation of Paris*, 12 C. P. 445, 450; *Regina v. Oxfordshire*, 1 B. & Ad. 289; *Regina v. Oxford, &c., Turnpike Roads*, 12 A. & E. 427, in which last case Lord Denman, C. J., observes: "I know of no instance of a mandamus to repair a road."

If a mandamus may be granted in such a case as this, I do not see why it may not be granted in any case, where a municipal corporation fails to comply with the duty expressly imposed upon it by section 531, to keep every public road, street, bridge, and highway in repair; a course which we cannot but see would be productive of extreme inconvenience.

In the case of *Re Township of Augusta and Counties of Leeds, &c.*, 12 U. C. R. 522, a mandamus *nisi* only was granted, and the objection now raised seems not to have been taken. Moreover the section on which the court in that case acted, 12 Vict. ch. 81, sec. 37, and which corresponds in a general way with section 534 of the present Act, was then framed in more stringent terms, expressly *requiring* the council to do the particular act. That case cannot therefore be regarded as a decision on all fours with the present case.

The cases in which the courts have granted a mandamus to county councils to erect and furnish registry offices: *Regina v. Northumberland and Durham*, 10 C. P. 526; *Ward v. Northumberland and Durham*, 12 C. P. 54; *Re Whelihan v. Perth*, coram Gwynne, J., not reported, seem to me quite distinguishable. There was in such

cases no remedy beyond a mere indictment for disobedience of the statute, and therefore no specific remedy, for the registrar was held not to be entitled to provide an office, and charge the county with the rental. The cost of the erection of the office was also limited by the former statute to a particular sum, and by the present Act the office is to be erected upon a plan, and on a site to be approved of by the Lieutenant Governor-in-Council.

An objection was taken to the sufficiency of the demand on which the application for the mandamus was founded. I am of opinion that it is entirely insufficient according to the requirements of our practice, which in *Tapping on Mandamus*, pp. 282, 283, 284, is thus stated :

“ It is an imperative rule of the law of mandamus, that, previously to the making of the application to the court for the writ to command the performance of any particular act, an express and distinct demand or request to perform it, must have been made by the prosecutor to the defendant. * * Both the *demand* and refusal must also be shewn on the affidavits made use of in support of the application. * * The demand must be express and distinct, and not couched in general terms ; it should accurately demand a performance of that which the defendant legally can and should do.” *Regina v. Bruce*, 11 C. P. 575, 580 ; *Re North Fredericksburg*, 37 U. C. R. 534.

I have not been able to satisfy myself that any clear distinction exists on this point between a case where a mandamus is sought to enforce the performance of a public duty, and any other case. The difference between that which is here relied upon as a demand, and that which was held to be sufficient in the case of *Brooks v. These Defendants*, is very marked, as will be seen by examining the printed appeal book in that case.

Therefore, I think, the appeal should be dismissed.

The court being equally divided in opinion, the appeal was dismissed, with costs.

DORLAND V. JONES.

*Trustees for religious body—Inquiry as to principles and doctrines—
Organisation of religious body.*

In 1821 J. Bowerman and J. Bull joined in conveying certain lands to three persons, trustees of the West Lake Meeting of Friends, appointed by the Monthly Meeting to secure the titles of meeting house lots, and burying grounds, "*to have and to hold said parcel of land hereby granted unto the aforesaid trustees of said Monthly Meeting for the time being, and for their successors in trust as said meeting shall from time to time see cause to appoint, for the only use and benefit of said meeting,*" and in 1835 Bowerman executed a further conveyance of a portion of those lands of which he had been the owner to two of the said trustees, "*and to their successors, in trust for said meeting so long as the members constituting it shall remain and be from time to time continued in religious unity with the Yearly Meeting of Friends (called Quakers) as now established in London, Old England, and no longer*"; *habendum* "*unto the aforesaid trustees of the said Monthly Meeting, and to their successors in trust for the time being as said meeting shall from time to time see cause to appoint, for the only use, behoof, and benefit of the said Monthly Meeting.*"

The defendants contended that the identity of the existing Monthly Meeting with that described in these deeds had been lost by reason of departures from the principles which governed the Society of Friends at the time the trusts were created, as well in matters of discipline and practice as in points of faith and doctrine, and that the plaintiffs were consequently no longer entitled to the use and possession of the lands: *Held*, [reversing the judgment of *PROUDFOOT, J.*, 7 O. R. 17,] that the criterion as to the Monthly Meeting was not the adherence to the doctrines and practices which prevailed at the time the trusts were created, but its continued existence as a Monthly Meeting of the organisation of the Society of Friends to which it belonged at those times, and possibly to its members continuing in religious unity with the London Yearly Meeting: and that the defendants, never having been recognised by or in connection with the Canada Yearly Meeting, had no rights as an organisation which a court of law could recognise or enforce.

THIS was an appeal by the plaintiffs from the judgment of *Proudfoot, J.*, reported 7 O. R. 17, and came on to be heard before this court on the 23rd, 24th, and 25th of September, 1885.*

S. H. Blake, Q.C., and *Clute* for the appellants.

J. MacLennan, Q.C., and *Arnoldi* for the respondents.

The facts giving rise to the action, the points raised, and the authorities cited are fully stated in the report of the case in the court below and in the present judgments.

**Present.*—*HAGARTY, C.J.O.*, *BURTON, PATTERSON*, and *OSLER, JJ.A.*

February 25, 1886. HAGARTY, C. J. O.—This case has been argued with very great learning and ability, and the clear and very full judgment below renders a detailed statement of facts unnecessary.

The deed of 1821, conveys the property to trustees of the West Lake Monthly Meeting of Friends, to hold to them and their successors for the only use and benefit of said meeting. The deed of 1835 (after the Religious Societies Act) reciting the earlier deed, grants to the trustees for said meeting so long as the members constituting it shall remain and be from time to time continued in religious unity with the yearly meeting of Friends (called Quakers) as now established in London, Old England, and no longer. We need not discuss the question whether the second conveyance controls or affects the legal result of the first.

The last deed shews that there was a monthly meeting or congregation belonging to a well known existing religious denomination called the Society of Friends. This society has been in existence for over two centuries. Its constitution has been fully explained, and the respective positions of monthly, quarterly, and yearly meetings ascertained and admitted. For many years this monthly meeting was subordinate to the New York Yearly Meeting.

In 1867 the latter meeting set off and established the Canada Yearly Meeting, of which the West Lake is a subordinate branch; and in the same year the Canada Yearly Meeting adopted the discipline of the New York Yearly Meeting.

In 1877 the latter revised its discipline, and in 1880, as is alleged, the Canada Yearly Meeting adopted the revised discipline of 1877.

In February, 1881, the trouble seems to have broken out in the West Lake Monthly Meeting, and the contest between the two parties for the possession of the meeting house, &c., began, which has resulted in this suit.

The plaintiffs insist that they and their predecessors are and have been since 1821 till this contest, in the quiet

possession as the West Lake Meeting, of all this property. The defendants claim that the plaintiffs have departed from the true faith and discipline of the society, and are no longer entitled to possession, and assume to themselves the character of the true West Lake Meeting, and as such justify their seizure of the real property of the meeting.

In this case the whole burden rests on the respondents to shew beyond reasonable doubt, that the plaintiffs have so far departed from the fundamental principles of the society, or have so far departed from its discipline and form of worship, which is here claimed to be the essence of the position, as 'in effect to cause them to be no longer members of the society. Such a departure (as in the vigorous language of Chief Justice Shaw) is "so deep and radical as to destroy its identity with the Society of Friends who had been invested by law with the enjoyment of property and civil rights. But, (he adds) if such a case be possible it would seem to be a suicidal destruction of the body itself, leaving its property derelict." Our task here is to examine whether the plaintiffs' title to this property is successfully attacked.

I fully agree in the general principle laid down in the very able and most careful judgment of my learned brother Proudfoot, that property may be conveyed to a religious body or in trust for them, on condition of their adherence to certain specified articles of faith, or certain prescribed discipline or ritual, as well expressed in the language cited of Mr. Justice Strong of the United States Supreme Court. I have read with much interest the lecture of that learned Judge on "The Relation of Civil Law to Church Polity, Discipline and Property," lent to me by my learned brother.

In *Tudor's Charitable Trusts*, (2nd ed.) 246, it is put thus: "If the institution was established for the *express* purpose of such form of religious worship, or the teaching of such particular doctrines as the founder has thought most conformable to the principles of the Christian religion, it is not in the power of individuals having the

management of that institution, at any time to alter the purpose for which it was founded." He then quotes Lord Eldon in *Attorney-General v. Pearson*, 3 Mer. 400: "If it turns out that the institution was established for the express purpose of such form of religious worship as the founder has thought most conformable to the principles of the Christian religion, I do not apprehend that it is in the power of individuals having the management of that institution, at any time to alter the purpose for which it was founded, or to say to the remaining members: 'We have changed our opinions, and you who assemble in this case for the purpose of hearing the doctrines, and joining in the worship prescribed by the founder, shall no longer enjoy the benefit he intended for you, unless you conform to the alteration which has taken place in our opinions.' In such a case therefore, I apprehend, considering it as settled by the authority I have referred to, that where a congregation become dissentient among themselves, the nature of the original institution must alone be looked to as the guide for the decision of the Court; and that to refer to any other criterion, as to the sense of the existing majority, would be to make a new institution, which is altogether beyond the reach and inconsistent with the duties and character of this Court."

These words, so often cited, were used in a case in which the property given to a Trinitarian Congregation, was reclaimed in after years from Unitarian hands. It turned very much on the then state of the law in England and the disabilities of Unitarians, but the general doctrine remains of undoubted authority. We have to consider whether the respondents have made out their case. First, have the plaintiffs departed from any of the fundamental principles or tenets of the society as it existed in 1821, or have they departed from its practice and discipline so as in effect to be no longer the same society or members thereof? and in connection with this, we have to consider the right of the society in the exercise of its acknowledged constitutional powers, viz., by the action of the Yearly Meeting, the admitted highest tribunal which it possesses, to change either doctrine or discipline.

It may not ultimately be necessary to discuss its power as to doctrine, but to confine the inquiry to disciplinary alterations.

It may be convenient in the first place, to glance at some of the leading authorities on the subject. The *Lady Hawley's Charity Case*, is well known, and the various discussions and judgments are most instructive; *Attorney-General v. Shore*, 11 Sim. 592; *Shore v. Wilson*, 9 Clk. & Fin. 350.

In *Attorney-General v. Gould*, 28 Beav. 485, property was purchased and conveyed to trustees "in trust, to and for the use and benefit of the congregation of Particular Baptists within the city of Norwich, * * and so as the messuage and premises might be always held, used, and enjoyed as a place of public worship of Almighty God, for the congregation for the time being."

The question was, whether as the information charged, persons not baptized by total immersion, were unlawfully admitted to communion of the Lord's Supper contrary to the principles of Particular Baptists, and also that persons not Baptists were so admitted. The defence was, that "The question between open and strict communion in congregations of Particular Baptists, had always been an open question." The Master of the Rolls said he had simply to determine a legal question, whether having regard to the terms of the deed founding the chapel, free communion is to be henceforth interdicted in the practice of its members, and he was bound to inquire whether the doctrine of faith of Particular Baptists excluded the practice of free communion. "In other words, I have to determine whether the employment of the building for this purpose, is such a perversion of the objects and trusts for which it was established, that is, whether it is a violation of those trusts which the court will interfere to prevent." He then considers whether the fundamental principles of the faith of Particular Baptists are so declared.

After an examination of the authorities, and the very heated controversies for nearly two centuries on this point,

he appears to consider it an open question. That it also appeared that in all matters not fundamental, "it was part of the constitution and essence of such church or congregation of Particular Baptists, that they might regulate their practice as they thought fit. This particular congregation had from its first institution adopted the practice of strict communion until very recently. He held that this did not help the plaintiffs, "because the words of the deed say nothing about maintaining the existing practice." He adds that it is a misapprehension of the doctrine of a court of equity, with reference to usage and custom, that any one can be brought to the opinion that previous custom will in such case bind the congregation, and he expresses surprise that it could be maintained "that a practice not involving fundamental points of faith, and not prescribed by the deed of endowment, can have become so fixed by custom as to be incapable of alteration, if the majority of the congregation shall be of opinion that such alteration will be more in accordance with the faith they profess, and more acceptable to the Great Being whose ordinance they assemble to observe." The judgment of Chief Justice Shaw in *Earle v. Wood*, 8 Cush. 430, is very instructive on two points of the case before us first as to variance in practice or discipline.

"It would seem to be inconsistent with the nature and principles of the Quaker system, as far as it is disclosed in the case before us, to be bound down as a body, as a Christian denomination, to a precise and unbending rule in matters of speculative opinion. They profess to believe in the continued influence and presence of the Holy Spirit in the mind of each individual humbly waiting for its manifestations, to aid in the discovery of Divine truth. It would seem therefore, that they must suppose it possible that new truths may be discovered, and so manifested as to require the assent of the true disciple, and thus add something to its existing faith; * * should the testimony of the Scriptures, and the influence of the Holy Spirit concur in bringing to the conviction of humble, sincere and inquiring minds, the knowledge of further Christian truths, manifest with a brilliancy and clearness not to be mistaken; it seems perfectly consistent with the avowed principles of the Society of Friends to adopt and sanction them, although they were not known to Pennington, Barclay, or

Fox, and the respected founders of their society, and under a full belief that if the same light had been thrown on the same truths in their day, those sincere and seeking men would have humbly and devoutly embraced them * * If after solid and weighty consideration, humbly and conscientiously awaiting the guidance of best wisdom, the Yearly Meeting should fully unite, in the proper as well the Quaker sense of the term, in adopting some modification of their creed or of their speculative opinions, adhering to their great principles of love and fraternal duty, it would upon their professed principles seem too much to say that they would thereby cease to be Quakers and cease to be the Society of Friends. Especially we think, this could not be asserted by meetings and individuals subordinate to them, who owe ecclesiastically allegiance to them and to whom, so long as they remain subordinate, the decisions are final and infallible as well in matters of faith as of conduct."

This judgment is most full and instructive. It also fully discusses the question as to the legality of the meetings, quarterly and yearly. Some of the New York cases seem to turn very much on the effect of their statute incorporating religious societies. *White Lick Meeting, &c. v. White Lick Meeting*, 89 Indiana 136 (1883), is a very important case, involving questions on a schism in the Society of Friends strongly resembling, if not identical with some of those raised before us. It reviews most if not all of the previous decisions. It quotes largely from Chief Justice Shaw's judgment in *Earle v. Wood*, and declares that he has not too strongly stated the power of the Yearly Meetings in ecclesiastical affairs. The Court adds, "Every church and every principal ecclesiastical denomination, claiming to be founded on Christian principles, or composed of persons calling themselves Christians, has within itself some *quasi* legislative and supreme powers having control over matters of doctrine as well as discipline, and having some jurisdiction at least over what pertains to the faith as well as the practices of its members."

The judgment also deals with the question of the disputed regularity of the Yearly Meeting.

Watkins v. Wilcox, 66 N. Y. 654, seems to adopt the principle of the decision in *Gable v. Miller*, 2 Denio 492,

where Gardiner, President, says, "It must be a plain and palpable abuse of trust, which will induce a Court of Equity to interfere respecting a controversy growing out of a difference in religion and sectarian trusts."

Harrison v. Hoyle, 24 Ohio Sup. Ct, 254, is very full as to the proceedings of the Yearly Meeting, and the action of the clerk in ascertaining the "solid sense" of the members. The judgment of the Sup. Ct. of U. S. (1871), in *Watson v. Jones*, 13 Wallace 679, very fully reviews the general law. The head notes epitomise the views of the court. After stating that the court will inquire into the religious faith or practice of the persons claiming the use or control of property devoted, by the express terms of the gift, grant, or sale, to the support of any specific religious doctrine or belief.

Or—"If the property was acquired in the ordinary way of purchase or gift for the use of a religious society, the court will inquire who constitute that society or its legitimate successors, and award to them the use of the property—

And—"In the class of cases in which property has been acquired in the same way, by a society which constitutes a subordinate part of the general religious organization, with established tribunals for ecclesiastical government, these tribunals must decide all questions of faith, discipline, rule, custom, or ecclesiastical government * * and the civil courts will accept their decision as conclusive."

Reference may be made to the celebrated "Essays and Reviews" cases, *Williams v. Bishop of Salisbury*, and *Wilson v. Fendall*, 2 Moo. P. C. N. S. 375, and the judgment of the Chancellor as to the certainty and precision required, before convicting anyone of departure from the Articles and Formularies of the Church. The head notes summarize thus: "Matters of doctrine in which the Church has prescribed no rule, may be discussed without penal consequences, and no rule is to be ascribed to the Church which is not found expressly and distinctly stated, or which is not plainly involved in or to be collected from the written law of the Church."

The spirit in which alleged variations from articles and rubrics is discussed, is exemplified in the judgment of the Privy Council in *Gorham v. The Bishop of Exeter*, 14 Jur.

443 P. C. Morris—"The *Gorham Case*," p. 472. "We agree with Sir Wm. Scott in the opinion he expressed in *Stone's Case* (1 Hag. Consistory Reports): 'If any article is really a subject of dubious interpretation, it would be highly improper that this court should fix on one meaning, and proscribe all those who hold a contrary opinion regarding its interpretation.'"

On this branch we may refer to the very elaborate judgment of Lowry, C. J., in *McGuinnis v. Watson*, 5 Wright's Pennsylv. Reports 9, (1861). There is an interesting historical review of the various secessions, out of which the Craigdallie case arose.

I should gather from the evidence that the immediate cause of the secession of the defendants, was the adoption by the Yearly Meeting of 1880, of the New York Discipline of 1877.

I may refer to Mrs. Varney's testimony, she being apparently the leading witness for the respondents both as to faith and practice. The reasons against the appeal (No. 11) contend that by adopting the new discipline, the plaintiffs ceased to answer the description of the beneficiaries under the trusts.

The defendants strive to prove that for some years before the Yearly Meeting, there had been innovations and changes in the form and conduct of the meetings at West Lake. But I cannot gather from the voluminous evidence that any formal complaint or attempt was made to bring such matters before regular tribunals of the Society, the Monthly, Quarterly, or Yearly Meeting. On the contrary, up to and at the Yearly Meeting of 1880, all the parties acted in outward conformity and attended such Meeting.

I think it proved with reasonable clearness that the revised discipline was fairly and legally passed and adopted by that Meeting.

The evidence shews that the clerk, to whom it is admitted the function belongs to ascertain the sense of the Meeting, did ascertain, as I think, in a reasonably fair manner after a full discussion, and when he declared it adopted and passed there was no dissentient voice raised. I think

the defence wholly fails to invalidate that proceeding. I refer to Chief Justice Shaw's remarks (p. 454) as to the position and duties of the clerk.

Up to this time no schism had occurred. The Yearly Meeting is regularly appointed to meet the following year at Norwich. The defendants set up a Yearly Meeting of their own, and meet the following year at Pickering, ignoring the Yearly Meeting at Norwich; they form a new West Lake Monthly Meeting and then comes the struggle for the possession of the meeting house. Their justification for this course is asserted to be that the plaintiffs by the adoption of the new discipline, and by their alleged departure from the orthodox doctrines and practices of the society have, in their own language, "ceased to answer the description of beneficiaries under the trust."

It seems clear to me on the evidence that the defendants have seceded from the regular and legal organization of the society, and that nothing had been done by the latter to justify the seizure of the property, or disturb the possession for nearly sixty years held by the regular Monthly Meeting.

Although my judgment does not turn on the point, I cannot help thinking that the proper course for the new organization to have taken to test their rights, would have been a proceeding by information or other method to obtain the judgment of the courts to establish their claim, and to oust the plaintiffs for their alleged lapses from the true doctrines.

I am of opinion that it was competent for the society to alter its discipline and forms, and its highest constitutional authority the Yearly Meeting can lawfully make such alterations, and that dissentients from such a change cannot be heard to insist that the right to the enjoyment of property is thereby forfeited. As already stated, the founders could, if they had so pleased, have made a specified form of doctrine or formula of worship of the essence of the trust. Nothing of the kind has occurred here. If we accede to the respondents' contention, the Society of Friends holding property on the general trusts here expressed would

be in a most helpless state under a cast iron rule forbidding all variation or change.

It is not necessary for this decision to decide the case suggested in *Earle v. Wood*, 8 Cush. 430, of a departure from fundamental principles. I believe there has been no such departure.

I am unable to follow the judgment appealed from, in holding in effect that there can be no material change or departure from the mere manner of conducting a meeting for worship in 1821. The authorities which I have cited seem to me to answer this objection.

The case at the rolls of *Attorney-General v. Gould* 28 Beav. 485, is clear to shew that a uniform practice or custom for 120 years cannot prevent a society from adopting a change in a matter not of fundamental importance.

The learned judge below contrasts the two disciplines. The later one omits the provisions of the older as to "days and times," in names of days and months, plainness of dress, address, etc. The latter abbreviates the larger terms of the older order by a general exhortation against extravagance in dress, and omits the directions as to "address." It has been often pointed out that the "peculiar dress" was simply the ordinary garb and dress of the period, without extravagance of ornament or fashionable additions.

It also omits certain words as to waiting for the Divine influence at their meetings. This my learned brother thought had the effect of changing the order of the society. It also omitted a direction as to marriage. It also, as he thinks, introduced the principle of carrying measures by a majority.

It also omits the provision against a hireling ministry, or payment for teaching the Gospel. The only point on which it is said that it varies in point of doctrine is as to the Resurrection—that the later discipline adds the words that the punishment of the wicked and the blessedness of the righteous shall be alike everlasting. This is considered as committing the body to a positive declaration in a matter of much controversy.

I find in a book called William's Dictionary of all Religions, 119, a quotation from Penn and from Sewel's History, (1722), stating the doctrine thus: "They that had done well to the resurrection of eternal life; they that have done evil to everlasting condemnation."

The other matters of difference, in my judgment, come clearly within the jurisdiction of the Yearly Meeting.

Much stress was laid upon the apparent change in the meetings, in not remaining silent for some time till the Spirit suggests an utterance. All parties seem to agree that what ever is done, is, or ought to be done under that sacred guidance. It seems impossible for us to decide at what moment the utterance should take place, or that a silent interval of some duration must occur. Such a rule may involve in some cases, a resisting of the sacred influence by the delay when the impulse is for immediate action.

It is as painful as it is unusual to be obliged so to speak judicially on such a subject.

It is only necessary to read some of the particulars furnished by the defendants of alleged aberrations on the plaintiffs' part. "That conversion is instantaneous, and such instantaneous fact includes justification. That the new birth is a fact and not a process. That the scriptures being the Word of God, are equal to and one with the Spirit of God, &c.

I frankly confess that many of them involve metaphysical distinctions and subtleties, which are beyond my mental powers to distinguish, much less to determine.

Some of them have engaged the minds of men from the early days of Christianity downwards, and it may be said perhaps without presumption that these attempts to crystalise, as it were, some of the most profound mysteries of our common faith into dogmatic propositions of verbal exactness and obligation, have wrought more evil, and caused more disquiet and dissension amongst Christian communities, than almost all other causes of dispute.

There must be some liberty allowed to the individual mind, and also some allowance for the difference in the perceptive faculties of minds, in the interpretation placed on words sometimes of rather ambiguous import. As far as I am capable of judging, I see nothing in the evidence before us, to warrant the conclusion that any substantial or fundamental variance, has been proved against the plaintiffs, from the leading doctrines and principles of the Society of Friends. As to the asserted changes in the forms of their meetings for worship, which have evidently much influenced the judgment of the court below, I can see nothing in them even if proved far more distinctly than I consider them proved—which any religious society might not make without the interference of the civil courts with their property. I think any person familiar with the appearance of a church congregation, either Episcopalian or Presbyterian, 40 or 50 years ago, might possibly see in the present day far more remarkable variances than those in the case before us, and that too in churches having definite creeds and prescribed forms of worship. It seems beyond question, that within the last twenty or thirty years the society has in some degree relaxed much of their special discipline.

Their own constitution seems to afford ample means, by the final authority of the Yearly Meetings, to adjust and regulate such matters.

As far as I can ascertain, this society especially aims to regulate and settle its internal disputes without recourse to outside tribunals. We may refer to the Discipline of 1859, under the head of "Differences and Arbitrations," as to the society's directions in such matters.

The defendants' course in seizing the property in possession of the plaintiffs, without first obtaining the judgment of the courts of their own body, seems hardly in accordance with the discipline. It is true that the legal proceedings are taken by the plaintiffs, but no other course seemed open to them, as they could not expect their opponents to accept the decision of the Yearly Meeting, whose

existence they wholly ignored by setting up a distinct organisation.

I may refer to an article in the *Annual Encyclopædia*, 1882, at p. 327, regarding proceedings of the London Yearly Meeting as to paid ministers.

Annual ditto, 1883, as to the adoption of a further revision of the *Book of Christian Discipline*, issued about November, 1882, by the London Yearly Meeting, the 4th edition since the close of the last century, and the changes made thereby as to music and other matters.

Appleton's Encyclopædia, 1877, p. 323 ; *Encyclopædia Brit.*, 1859, article, Quakers, p. 722, as to certain changes of late years.

I think, on the whole, the appeal must be allowed, and the relief prayed for by the plaintiffs be granted.

BURTON, J. A.—The learned judge below has in his able judgment gone so fully into the facts that I do not propose making any statement further than is absolutely necessary to make my conclusions connected and intelligible.

One general plan of organisation is adhered to by all Quakers as constituting one united body throughout the world, holding fraternal relations with the Yearly Meeting of England established in London more than two centuries ago.

Its organisation consists of a series of bodies holding certain relations to each other and known as meetings.

I need only refer to three of these : the Monthly, Quarterly, and Yearly.

The Quarterly consists of delegates from certain Monthly Meetings, and the Yearly consists of representatives from all the Quarterly Meetings within certain territorial limits ; and each subordinate meeting is required to report at stated times to its immediate superior.

The greater part of the merely disciplinary and administrative business is transacted at the Monthly Meetings, but these proceedings may be reviewed at the Quarterly Meetings, with a further appeal to the Yearly Meetings.

A new Yearly Meeting is set up by some contiguous or convenient Yearly Meeting, but only with the consent of all the Yearly Meetings with which such contiguous Yearly Meeting is in unity and fellowship; and no new Yearly Meeting is ever set up but with the consent of the Yearly Meeting within whose territorial limits the other subordinate meetings had been previously comprised.

The Yearly Meeting when once established has a final and controlling jurisdiction, as I understand it, in all matters of faith, religious duty, administration, and discipline, over all subordinate meetings within its territorial limits, and is regarded as having a coordinate supreme jurisdiction with other Yearly Meetings; the whole forming the ecclesiastical system known as the Society of Friends.

Down to the year 1867, the meetings in Canada were in connection with the New York Yearly Meeting, but in that year, with the assent of that body, the Canada Yearly Meeting was set up with the same discipline as was formerly in use in the New York Yearly Meeting, and the West Lake Monthly Meeting has been ever since in connection with and subordinate to the Canada Yearly Meeting.

The property which is now the subject of dispute, between the two conflicting bodies each claiming to constitute the West Lake Monthly Meeting of Friends, was purchased in 1821, and conveyed to trustees, but in such a manner as only to vest in them an estate for their lives, in trust for a meeting house and burying ground for that meeting.

The difficulty has arisen in consequence of the adoption by the Canada Yearly Meeting of the New York discipline of a later date, or as the defendants put it in their defence, "the plaintiffs in and about the year 1880, asserted and endeavoured to impose on the Society of Friends in Canada and upon the West Lake Monthly Meeting of Friends, a certain other discipline in many respects differing from and inconsistent with the said New York discipline of 1859, and they pretended and alleged and still pretend and allege that the same was adopted by the Society of Friends at the Canada Yearly Meeting of 1880, which the defendants say is untrue, and they acting upon the said new discipline and

acting contrary to the said New York discipline of 1859, have held separate meetings from the defendants, and the adherents to the said New York discipline of 1859, and have from time to time introduced practices and doctrines at such meetings at variance with the said old discipline, and with the well known and established belief and practice of the Society of Friends, and they continue to do so, and the plaintiffs are separatists and not entitled to the property of the said West Lake Monthly Meeting or control of the same in any way."

This is the contest between the parties. I do not refer to the deed of 1835, as it does not affect the three acres upon which the meeting house now in question stands, and because there is nothing to shew that the body whom the plaintiffs represent does not continue in religious unity with the Yearly Meeting of Friends, established in London; whereas it is manifest that the defendants have no relations whatever with that meeting.

The property was purchased for the benefit of a congregation then known as the West Lake Monthly Meeting of Friends, not as a separate body, but as a portion of the larger organisation to which I have referred. Have the defendants shewn that they constitute that Meeting?

I do not think I can more clearly explain my own views in reference to the mode of determining a question of this kind than by giving a short extract from the judgment of the Chief Justice in the *White Lick Case*, (89 Ind. 136,) at p. 155 :

"Where," he says, "a schism occurs in an ecclesiastical organisation which leads to a separation into distinct and conflicting bodies, the respective claims of such bodies must be determined by the principles which underlie the control of voluntary associations. If there be within the organisation officers or duly appointed persons in whom the powers of such control are vested, those who adhere to the acknowledged organism by which the organisation is governed are entitled to the use of the property without reference to whether they constitute a majority. The title to the property of a divided church is in that part of the organization which is acting in harmony with its own law; and the ecclesiastical laws, usages, customs, principles, and practices, which were accepted and adopted by the church

before the division took place, constitute the standard for determining which of the contesting parties is in the right."

Up to the Yearly Meeting in 1880 all parties had been in subordination to and in fraternal relations with the Canada Yearly Meeting. Among the subjects introduced at that meeting was the question of the introduction of a new discipline; one which they had an undoubted right to deal with.

The manner of proceeding is peculiar to the body. No division is ever called for or vote ever taken. The members wait for a union of minds and endeavor to reach a conclusion by yielding up of opinion to those most competent to judge of the measure proposed. If entire unity is not made manifest the clerk proceeds to collect what appears to him to be the "solid sense" of the meeting.

In gathering this he takes into consideration the number, age, intelligence, experience, piety, and other distinguishing traits of those uniting with and those opposing the measure. He then makes a minute and reads it to the meeting. If it is acquiesced in it is recorded as the action of the meeting; but if it is not so acquiesced in, the measure is either modified, postponed, withdrawn, or dismissed.

Evidence was given to shew that the meeting was not unanimous, but if that be so the opposition was not of a kind to have called for a postponement or withdrawal of the question, and so far as we can glean from the minutes, the opposition would seem to have been withdrawn; and Mrs. Varney admits that when the minutes were signed and submitted to the Women's Meeting no objection was raised.

The regular Yearly Meeting for 1881 was held pursuant to the adjournment at Norwich, but the defendants and their friends held a separate Yearly Meeting at Pickering—a Yearly Meeting not in communication with any of the body except Kansas and Western Iowa—and from that day to the present the defendants appear to have repudi-

ated all connection with or subordination to the Canada Yearly Meeting.

If, in consequence of some local disagreement among the members of the Monthly Meeting the defendants had separated and applied to the Canada Yearly Meeting for recognition and been admitted by that body as the West Lake Monthly Meeting, a very different question would have been presented; instead of doing so they have legally or illegally—it is not important which—sought and obtained admission to a Yearly Meeting with which the West Lake Monthly Meeting never could have had any relations, and as they never have been recognised as an organised body by the Canada Yearly Meeting within whose territorial jurisdiction they sought to organise, they have no rights as such organisation which a court of law can recognise or enforce.

If this view be correct it must necessarily be of no importance, whether the doctrines and practices of the members of the Meeting as practised by the plaintiffs be regular and orthodox or the reverse.

These are fortunately matters upon which in the view I take of the question, we are not called upon to express any opinion. The dissatisfied members not only withdrew from the organisation, but endeavored to form a new association in violation of the usages of the Quaker body, and they cannot therefore properly claim to be the West Lake Monthly Meeting for whose use and benefit this property was purchased.

I am of opinion, therefore, that we must allow the appeal, with costs, and that the plaintiffs are entitled to an order declaring that the meeting they represent are entitled to the property referred to in the claim, and the costs of the suit.

PATTERSON, J. A.—We have to determine which of two associations, one represented by the plaintiffs and the other by the defendants, is entitled to the use of a meeting house which stands upon land described in a deed dated the 14th day of 5th month in the year 1821.

The parties to the deed are Jonathan Bowerman and John Bull of the one part; and Jonathan Clarke, Daniel Haight, and Gilbert Dorland, trustees of the West Lake Monthly Meeting of Friends, appointed by the said Monthly Meeting to secure the titles of meeting house lots and burying grounds, of the other part. Bowerman and Bull in consideration of £15, grant, &c., to Clarke, Haight, and Dorland, and to their successors, in trust for said Monthly Meeting, six acres of land, being parts of lots 9 and 10 in the 2nd concession of the military tract in the township of Hallowell, Midland District and province of Upper Canada, "to have and to hold said parcel of land hereby granted unto the aforesaid trustees of said Monthly Meeting for the time being, and for their successors in trust as said meeting shall from time to time see cause to appoint, for the only use and benefit of said meeting."

We are told that the grantors Bowerman and Bull, although they jointly conveyed the six acres, had no joint estate in any part of them, but that Bowerman owned lot 10 and Bull owned lot 9, three acres of each lot going to make up the six acres.

Another deed was made by Bowerman, dated 14th December, 1835, conveying the three acres of lot 10 to Jonathan Clarke and Gilbert Dorland, trustees of the West Lake Monthly Meeting of Friends (called Quakers), appointed by said meeting to secure the titles of meeting house lots and burying grounds, and to their successors, in trust for said meeting so long as the members constituting it shall remain and be from time to time continued in religious unity with the Yearly Meeting of Friends (called Quakers) as now established in London, Old England, and no longer; habendum unto the aforesaid trustees of the said Monthly Meeting, and to their successors in trust for the time being as said meeting shall from time to time see cause to appoint, for the only use behoof and benefit of the said Monthly Meeting.

The deed then, after reciting the deed of 1821, and referring to the act of 1828, 9 Geo. IV., ch. 2, which

authorized conveyances to trustees for certain religious societies, including Quakers, in a corporate character, of lands not exceeding five acres (a restriction which was removed in 1840 by 3rd Vict. ch. 73), proceeded in words which I prefer to read at length in place of attempting to express their effect by any technical terms known to conveyancers: "He the said Jonathan Bowerman in order to fulfil and realize his said original contract with said Monthly Meeting in a state of perpetuity doth hereby for him, his heirs, executors, administrators and assigns, establish and confirm unto the said trustees herein first named in trust for said meeting the full right of inheritance forever as aforesaid in a state of legal reversion. That is to say, that this indenture shall be valid in law and remain in full force and virtue by retaining the full and lawful possession and occupation of the said demised premises to the Monthly Meeting as aforesaid, and to come in full force perpetuity, and right of inheritance at the precise juncture and instant of time in which the last surviving trustee shall die: to wit: the aforesaid Daniel Haight, Gilbert Dorland, and Jonathan Clarke, as acting trustees to said original deed. And the said Jonathan Bowerman doth hereby for him, his heirs, executors, administrators and assigns forever warrant and defend in peaceable right of inheritance, the within mentioned premises to the said trustees of said meeting, and to their successors in trust as aforesaid, subject to the foregoing clause of unity with the yearly meeting in London, and in violation whereof this deed to be null and void."

By the deed of 1821 the legal estate in the land was only vested for life in the trustees; and although one object of the deed of 1835 seems to have been to enlarge the estate in the three acres of lot 10 into a fee simple, it may be doubted whether such an estate was created in the trustees either as individuals or as a corporate body authorised by the act of 1828. That however is immaterial at present, the important question being who are the *cestuis que trustent*, or the beneficiaries described in the deeds. If we can settle that question, it matters little who may be the trustees, whether the heirs of the grantors, or some one representing by inheritance or succession the grantees named in the deeds.

But though the deed may not have been framed so as to constitute a corporate body under the act of 1828, the reference which it makes to that act is significant as identifying the meeting with the body of Quakers named in the act itself.

Bowerman, of course, could not by his own act in 1835, add to or alter the trusts of the deed of 1821. The reference to the London Yearly Meeting may or may not have been regarded as such an addition or alteration. When we remember that the meetings in Canada were subordinate to the New York Yearly Meeting, and not to that of London, it will appear not improbable that this reference was inserted in consequence of the separation that had taken place in America, in 1828, between the Hicksite and Orthodox Quakers, and that it may have been intended to explain and fix, and not to vary, the trusts of the earlier deeds.

However this may be, the second deed was accepted by the Monthly Meeting, and we may safely assume was prepared at its instance. The timely and careful inspection of titles of meeting houses, burying grounds, and other estates which have been vested in trustees for the benefit of the society or of any of its meetings, is recommended to the attention of Quarterly and Monthly Meetings by the Book of Discipline of the New York Yearly Meeting which was in force when both of these deeds were made; and in both deeds the trustees are described as appointed by the meeting to secure the titles of meeting houses, lots, and burying grounds. Our task is to indentify if we can the West Lake Monthly Meeting of Friends which is the beneficiary under both deeds; and if the reference in the deed of 1835 to the London Yearly Meeting helps us to do that, it will in my judgment serve the purpose for which it was introduced into the deed.

Referring to the book printed in 1826, containing the Discipline of the New York Yearly Meeting revised and adopted in 1810, we find it stated that "for the more regular and effectual support of the order of the Society,

besides the usual meetings for the purpose of Divine Worship, others for the exercise of our discipline are instituted, subordinate to each other, as First—Preparative Meetings, which commonly consist of the members of a meeting for worship; Secondly—Monthly Meetings, which generally consist of several preparative meetings; Thirdly—Quarterly Meetings, consisting of several monthly meetings; and Fourthly—The Yearly Meeting, consisting of all the quarterly meetings." It is also laid down that "No Quarterly Meeting is to be set up or discontinued but by the Yearly Meeting; no Monthly Meeting but by the Quarterly; no Preparative Meeting, or a Meeting for Worship, but by the Monthly Meeting with the approbation of the Quarterly Meeting; and if at any time the Yearly Meeting be dissatisfied with the proceedings of any of the said meetings, or a Quarterly Meeting with the proceedings of any of its Monthly Meetings, or a Monthly Meeting with the proceedings of any of its Preparative Meetings, they are to render a full and clear account when required."

Again we find a system of appeals provided from the Monthly Meeting by which a member may have been disowned to the Quarterly Meeting, and thence to the Yearly Meeting whose decision is declared to be final.

These appeals are on matters of faith and doctrine as well as on whatever other ground has been acted on by the Monthly Meeting. I do not find this laid down in so many words in these New York books, but it is covered by the general provisions; and in the English books where more details of procedure are arranged, special reference is made to appeals on matters of faith and doctrine. It happens also to be shewn by the minutes of the Monthly Meeting to which the defendants now belong, in which we find testimonies of disownment of several persons for having taken an active part and identified themselves with those who preach doctrines and adopt practices inconsistent with the principles of the Society of Friends, and where persons are appointed to inform the erring friends of their disownment and of their right to appeal.

The place of the West Lake Monthly Meeting in the system and polity of the Society is thus clearly shewn.

In this respect the Monthly Meeting to which the plaintiffs adhere is the identical organisation described in the deeds for whose use the property is to be held.

In 1821 and 1835 it was a subordinate member of the section of the Society of Friends of which the New York Yearly Meeting was the head. The establishment in 1867 of the Canada Yearly Meeting, with the assent of the Yearly Meetings of New York and other places, made the section smaller, but left the position of the West Lake Monthly Meeting unaltered as a meeting immediately subordinate to and forming part of the West Lake Quarterly Meeting and subject to the jurisdiction of an independent Yearly Meeting. Its position in the organised system was unchanged and has never been changed. In that respect the description in the deeds "West Lake Monthly Meeting of Friends" is applicable to-day in the same sense as when the deeds were executed.

But it is contended for the defendants that the identity of the present meeting with the meeting described in the deeds has been lost by reason of departures from the principles which governed the society at the time the trust was created, in the conduct of Divine Worship and other matters of discipline and practice, as well as on points of faith and doctrine.

The real object of attack is necessarily the Yearly Meeting, although the occasion arises in a contest concerning the property of a Monthly Meeting.

If the Canada Yearly Meeting, constituted in 1867, and which is on all hands admitted to have at that time truly represented the Society of Friends, is still to be regarded as belonging to that society, it cannot be asserted that any one of the subordinate meetings which continue their connection with it is not a meeting of the same society.

The books called Books of Discipline issued by the authority of the Yearly Meetings are taken to be the exponents of the opinions held and practices authorised or enjoined by the meetings; and the defendants rely, mainly if not altogether, on variances between the disci-

pline adopted by the Canada Yearly Meeting in 1880 and the earlier utterances, for proof of the departures which they say disable the present body from claiming to be the Society of Friends contemplated by the title deeds.

I am unable to concur in the opinion that the question of title with which we have to deal can be decided by any examination and comparison which we can make of the doctrines or tenets alluded to. I take the case to be essentially different from *Craigdallie v. Aikman*, 1 Dow 1. In that case the property had been purchased and the meeting house built for the use of a congregation adhering to a particular minister who was one of four who seceded from the Church of Scotland in 1737, and who were consequently deposed from their livings. The land was conveyed to trustees "for and in the name of the whole subscribers and contributors to the building of a meeting house for Mr. William Wilson, minister of the gospel in Perth, and the congregation who submits to his ministry, and in the name of the whole contributors towards a stipend for the said Mr. William Wilson, in the said congregation, and to the successors of the aforesaid contributors, who shall continue to contribute for the purpose before mentioned," &c. The congregation became attached to a synod which was formed after the secession. A split occurred in 1745, when a majority in numbers left the congregation, joining the new sect formed by the division, and giving up the chapel to the rest who are said to have comprised a majority of the original money contributors, and who adhered to the old principles. Fifty years later another division occurred in consequence of a majority of the synod adopting new and innovating doctrines, and in 1812 the question arose whether the chapel belonged to the majority of the then existing congregation who had adopted the new doctrines and adhered to the synod, or to the minority who continued to maintain the principles of the original secession. The decision was in favor of the latter.

The case is nearly the converse of the present one in which the conveyance is not to the congregation as a sep-

arate body, but as a portion of the larger organisation. From the reasoning on which Lord Eldon decided the case, I apprehend that if the trusts had been for a congregation of the Associate Presbytery, the decision would have turned on the question whether the congregation continued to fulfil that description, and not whether the tenets of the Presbytery had remained unchanged. He said "This congregation of persons adhering to Mr. Wilson, the seceding minister, was formed at Perth, and the building in dispute was at first prepared for a minister and congregation holding a particular description of religious opinions. The congregation acceded to the Associate Presbytery and the ecclesiastical discipline of the sect; but when it did so, it was clear that this was under the persuasion on the part of the congregation that the presbyteries and synods would continue in the same principles which formed the ground of the secession;" and at the close of his judgment he remarked: "If it were distinctly intended that the Synod should direct the use of the property that ought to have been a matter of contract, and then the court might act upon it." This allusion is evidently to a contract between the congregation which already owned the property and the Synod under whose ecclesiastical jurisdiction the congregation was voluntarily about to come. We have in the deeds before us evidence of such a contract at the acquisition of the property, in the fact that the conveyance is to the use of a congregation organised in connection with a system of church courts, and more particularly in the fact that the deeds shew on their face that they were arranged in obedience to the injunction of the discipline respecting the securing of titles to such property.

The cases in our own courts of *Doe v. Brass*, 6 O. S. 437, *Attorney-General v. Christie*, 13 Gr. 495, and *Attorney-General v. Jeffrey*, 10 Gr. 273, are instances in which congregations were identified with those in whose favor trusts were declared, by their continued connection with the body, and from their circumstances afford, in my judgment, striking illustrations of the last remark which I have quoted from Lord Eldon's judgment.

If, contrary to my present opinion, it were proper to decide the case by reference to the doctrines of the Society of Friends, I should have great difficulty in saying that any fundamental change has taken place. The new discipline apparently relaxes some rules of practice, though I am not convinced that the relaxation has gone in all cases so far as asserted in argument, and possibly apprehended by some of the Friends whose evidence we have before us; and there may be, though I by no means affirm that there are, utterances on doctrinal points in advance of what may have been formally put forward at earlier periods, or on which no formal statement was previously made by the Yearly Meeting; but before any argument can fairly be founded upon these things, it must appear that to change or to advance in such particulars is forbidden by the constitution or principles of the society.

The contrary seems to be indicated by what we see of the history of the body, including some evidence to which these defendants cannot object.

Take, for example, the New York Discipline of 1859, to which all parties assent as authoritative. It contains many things which were not contained in that of 1810, which latter must be regarded as the one in view when the trusts were declared. I do not now refer particularly to the introductory statement of doctrines, although we have no means of judging whether or not some of them may not be expressed in terms that would have been thought questionable in 1821 or 1835; or whether it embodies the whole of the tenets of the society. It is plainly no more than a statement of views held at the time upon the topics embraced in it.

But looking only at the Discipline proper, we learn from the book that as early as 1671 or 1672 meetings for discipline were held in New York, though the New York Yearly Meeting was not set off from the New England Yearly Meeting till 1695, and that rules for the government of the society, similar in many respects to those in use in 1859 are found in the earliest records: that the Dis-

cipline of Philadelphia, revised in 1719, was approved by the New York Yearly Meeting in 1762; revised in 1783; again in 1800, and again in 1810. The last mentioned code was therefore the result of at least five revisions; that of 1859 was another revision of the same class; and when in 1877 the New York Meeting made a further revision, and in 1880 the Canada Meeting adopted it, they were merely pursuing the progressive course that had marked the history of the society, and were not for the first time assuming functions of a legislative character.

We must not suppose that these *quasi* legislative functions were exercised only at the long intervals in making these periodical revisions of the books of discipline. They were exercised from year to year when, as occasion required, testimonies concerning doctrines or practice were issued in the form of general epistles or otherwise. At least I so understand the system; and I take the successive editions of the books to be compilations or abridgments or digests of the rules of discipline, and statements of doctrine and counsel, in force at the time of their issue, and not necessarily to imply that up to that time all the contents of the last previous edition had remained without change or modification. This legislation, as for want of a more accurate term I may call it, may have proceeded with greater activity in some Yearly Meetings than in others, and the labors of one may have sometimes been adopted bodily by another, as in 1762 the New York Meeting adopted the Philadelphia Discipline of 1719, and as in 1880 the Canada Yearly Meeting adopted the New York Discipline of 1877; but that does not disprove the proposition that the system permitted the adjustment of rules and recommendations, and the expression of opinions on the doctrines of scripture and other matters, according to the light from time to time given to the meeting.

That the practice was what I state is more apparent from the books of the London Meeting than from those of New York or Canada, yet the latter help to bear out my understanding. Thus the preface to the New York Disci-

pline of 1877, as reprinted for the Canada Meeting, concludes by saying: "In 1810 and in 1859 the Yearly Meeting revised it again—*since then paragraphs have been altered from time to time*, and during the present year, 1877, the whole work has undergone revision."

We have been furnished, for reference, with two copies of the Discipline of 1810, one printed in 1826 and the other in 1836. They both belong to the West Lake Monthly Meeting. They shew several amendments made between 1836 and 1859. Two of them, in the chapter on marriage, are shewn by printed slips pasted over the original paragraphs. The substance of one of these amendments is carried into the Discipline of 1859, but in a differently constructed paragraph; the other amended paragraph is entirely omitted. Another printed slip contains an amendment of the paragraph respecting tombstones; and other alterations have been made with the pen, as *e. g.*, an addition to the rules about appeals, and the cancelling of the injunction against marrying a deceased wife's half sister. These last three amendments re-appear in 1859. I observe also a printed note pasted into the old book, respecting the answers to be given to "queries" concerning the practice of Friends. It is not traceable in the Discipline of 1859, where the chapter on Queries has been partly re-written.

These things are part of the evidence which the book by its very existence affords, that elasticity and progress, and not rigid adherence to formulas, has been the rule of the society, and also of the fact that the legislation has been continuous and not confined to the periodical revisions of the entire book of discipline.

It happens that one of the charges against the new Discipline of 1877 is that it omits a recommendation which that of 1859 contained respecting the mode of dealing or laboring with a member who contemplated marriage outside of the society. This is noticed in the judgment now in appeal, 7 O. R. at p. 47-8. The objection calls attention to the fact that the book of 1859 made other departures, quite as material, from the rules respecting marriage laid

down in 1810, in addition to those already noted, and the right of the Yearly Meeting so to deal with its own rules or precepts has been always recognized by those who adhere to the Discipline of 1859, and is now in effect asserted whenever that Discipline is appealed to, as it is on this argument, as governing the construction of the trusts of 1821 and 1835.

There is an alteration which the learned judge in the court below speaks of (p. 47) as seeming to change the order of the Society by removing the injunction to wait humbly for the Divine influence; and he speaks of it in connection with the habit of some ministers, as shewn by the evidence, to begin worship at once on entering the meeting house without waiting for Divine influence at all, saying that they considered one anointing of the Spirit sufficient. My concern at present is merely with the Discipline, and I have nothing to say respecting the conduct of the ministers which is complained of.

The charge is the omission of the following passage:—"It is therefore the indispensable duty of friends in their meetings for the exercise of the discipline, humbly to wait for divine influence which will endue with patience and qualify them in their several stations and movements to build up one another in that faith which works by love to the purifying of the heart."

This passage which is in the book of 1810, as well as in that of 1859, is not part of the rules under the head of "Meetings for Worship," or "Meetings for Discipline." It occurs in the introductory chapter of each book where it is explained that for the more regular and effectual support of the order of the Society, besides the usual meetings for the purpose of Divine worship, *others* for the exercise of discipline are instituted. The passage relates to these meetings for discipline, and is not framed with respect to meetings for worship. Its form is that of a conclusion from stated premises, which premises are repeated in the new discipline although the conclusion is not there enunciated. The omission may or may not be important. That is not a matter for me to consider, though I cannot help

feeling that less importance would have been attributed to it, if read merely as a word of counsel touching the conduct of meetings for discipline, which seems to be its place in the context. But that, in omitting it, the yearly meeting was only exercising its recognized right and its accustomed function in varying the expression of its testimonies, appears by reference to the same pages of the books. We there find in the book of 1810 the statement that "In the administration of the discipline, it is our duty to treat with offenders in tenderness and love, agreeably to apostolic advice, 'Brethren, if a man be overtaken in a fault; ye which are spiritual restore such an one in the spirit of meekness; considering thyself, lest thou also be tempted.'" So far the books of 1810 and 1859 agree; but the book of 1810 adds: "and according to the gospel order 'If thy brother shall trespass against thee, go and tell him his fault between thee and him alone';" and so on, quoting the 15th, 16th, and 17th verses of the 18th chapter of Matthew. This is entirely omitted in 1859. I would not venture to say that the omission indicated the opinion of the meeting that this Christian rule of brotherly duty was no longer binding on the Society of Friends, though some of the arguments applied to the discipline of 1877 would go nearly that length. I merely cite the example which happens to be at hand of the practice to vary the form of the testimonies by omissions or additions, which practice is recognized by these defendants in common with the society in general as within the functions of the Yearly Meetings.

The London Yearly Meeting does not appear to have cast its rules into the character of a code like those of the American Meeting.

I have before me its books of Christian Doctrine, Practice and Discipline, issued in 1861 and 1883, being the fourth and fifth editions. They are, for the most part, compilations or collections of extracts from the writings of the founders of the society, and from the general epistles of the meeting; the date of each epistle from which an extract is given being noted. The book is stated in the

Yearly Meeting's epistle, 1883, to embody declarations and regulations issued under the sanction of the meeting at various times during a period upwards of two centuries, as regards the doctrine, practice, and church government of the religious society. The preface gives the history of the several editions issued in 1782, 1802, 1834, with a supplement in 1849, 1861, and 1883, and states that, as on each of the former occasions, omissions have been made and new matter added. It is not to our purpose to note the tendency or extent of the changes indicated by the later epistles. Suffice it to say that, in the direction of what is called progress, they are not less liberal than those made on this side of the Atlantic. The important feature is the fact that from early times the society has been progressive and not stationary; that at all events its constitution permitted modifications of its views of doctrine and duty, and its practice was to give expression from time to time to the views entertained.

When, therefore, the deed of 1835 declared the trusts for a meeting "so long as the members constituting it shall remain and be from time to time continued in religious unity with the Yearly Meeting of Friends, as now established in London;" it referred to a meeting which had no formulated creed or articles of faith that could be referred to as proof of the precise form of doctrine which prevailed at the moment; but which from year to year gave expression, by means of general epistles, to its opinions on matters of faith and doctrine, as well as on matters of practice in ecclesiastical services, and principles that ought to govern the lives and conduct of its members.

The practice of the London Meeting did not differ in principle from that of the American Meetings, though perhaps its testimonies were more frequent. It was in fact its function and duty under the constitution of the society, and must have been so understood by the parties to the deed.

It does not therefore seem a reasonable construction of the language of the deed, to hold that the unity contem-

plated was an unchanging adherence to the views which at its date might be those of the London Meeting, even if such views were susceptible of proof.

I think the more reasonable construction of the deed is that relied on by the plaintiffs. Having regard to the important circumstance that in the matter of doctrine and discipline the West Lake Meeting was subordinate to the New York Yearly Meeting and had no connection with that of London except through the fraternal relations sustained between the two Yearly Meetings which might be interrupted by either meeting declining correspondence with the other, as we are told the Philadelphia Meeting has done with regard to other Meetings, and as it was probably thought the London Meeting would do with regard to a schismatic meeting like that of the Hicksites; and having regard to the terms in which the trust is expressed—"remain and be from time to time continued in religious unity"—apparently referring rather to the attitude of the London Meeting towards the West Lake Meeting or the body to which it should from time to time belong than to the attitude of that body towards the London Meeting; I think we must take the reference to be to a meeting which should secure the continued recognition of the London meeting, a description which is answered by the meeting to which the plaintiffs are attached, and not by the defendants' meeting.

I do not understand the plaintiffs to admit that they have departed from the faith or principles of the Society of Friends to which the defendants as well as the plaintiffs belonged. I do not attempt to examine the alleged departures. It would only be proper to do so in case the title depended on that question. I agree with the learned judge in the court below that the identity of the West Lake Monthly Meeting is what has to be decided, but I hold that the criterion is not the adherence to the doctrines and practices which prevailed in 1821 or 1835, but its continued existence as a Monthly Meeting of the organisation of the Society of Friends to which it belonged at those dates, and

its members being continued in religious unity with the London Yearly Meeting.

The possibility of so great an apostasy on the part of those Yearly Meetings as would deprive them of all claim to be recognised as courts of the Society of Friends can only be a matter of speculation.

The gravity of such a question, if it ever should arise, would be increased if it were found that, as in the present case, the course which the court was asked to pronounce a departure from the principles of the society, had the sanction of Yearly Meetings of so much influence and authority as those of London, New England, and New York.

No such case is presented at present. When we hold, as in my opinion we must hold, that the adoption of the Discipline of 1877 was a proceeding within the functions of the Yearly Meeting, and that that meeting is by the constitution of the Society the ultimate Court of Appeal in matters of faith and doctrine as well as in matters of practice, we have in effect decided that the West Lake Monthly Meeting to which the plaintiffs belong, and the members of which, as members of the Yearly Meeting, are continued in religious unity with the London Yearly Meeting is the meeting for whose use the property in question is held.

I have so far assumed that the proceeding in the meeting of 1880, by which the Discipline of 1877 was adopted, was regular and binding. I do not think that the contrary has been shewn. But if the irregularity of the proceeding were conceded, I do not see how that would help the defendants; because it is only by adopting that discipline that the Yearly Meeting can be said to have gone astray. The doctrines objected to were never promulgated except through the new book of discipline. If that promulgation, or more properly if the adoption of that book, was not the act of the meeting, it follows that as far as the meeting is concerned things remain as they were in 1859.

I have not thought it necessary to comment on many decisions ; and in addition to those which I have referred to I would merely mention *The Attorney-General v. Gould*, 28 Beav. 485, as supporting the view I have taken of the trusts of the deeds before us. But I have not failed to avail myself of the assistance of the very instructive judgments delivered in the American cases which were cited to us, among which I particularly refer to the judgment of Chief Justice Shaw in *Earle v. Wood*, 8 Cush. 430.

We must, in my opinion, allow the appeal and decree in favor of the plaintiffs in terms of claim, with costs.

OSLER, J. A.—I agree in the result. I think the plaintiffs have not departed substantially from the faith and doctrines of the society ; and that they have made no alterations in its practice or discipline which the Yearly Meeting was not competent to make.

ORDER.—“ That the said appeal should be and the same was allowed, with costs to be paid by the respondents to the appellants together with the costs of the action in the court below, including the costs reserved by an order of that court bearing date the twenty eighth day of March, 1883, forthwith after taxation thereof, and that the said judgment should be and the same was set aside.

“ And the said court did declare that the appellants were and are the duly appointed trustees of the land in the statement of claim mentioned and described, as in the statement of claim alleged, and that they hold the said land in trust for the sole and exclusive use and enjoyment of the West Lake Monthly Meeting of Friends as represented by the plaintiffs as aforesaid.

“ And the said court did further order and adjudge that the defendants, their solicitors, attorneys, servants, and agents, be, and they are hereby enjoined from disturbing the plaintiffs or the West Lake Monthly Meeting of Friends as represented by the plaintiffs in the sole use and enjoyment of said trust property, and from molesting, injuring, or destroying the same.”

PETTIGREW V. THOMAS.

*Withdrawing case from jury—Sale of chattels—Delivery of possession
—Continuous possession—R. S. O. ch. 118.*

In an interpleader issue it was alleged that the plaintiff (the claimant) had purchased a horse from S. B. S., a married woman carrying on business in her own name, the price of which was said to have been paid partly in a note of hand of S. B. S. and her husband, for money lent to them, and partly by a set-off of wages coming to plaintiff from S. B. S. On the completion of the purchase the plaintiff took the horse, together with a cutter and harness belonging to S. B. S., and was absent for two or three days. On his return he put the horse in the stable of S. B. S. as before, and fed it with her fodder, &c.—no other act was shewn to indicate a change of ownership before the animal was seized by the sheriff under a *fi. fa.* goods issued against S. B. S.

Per BURTON and PATTERSON, JJ.A., [affirming the judgment of the County Court,] that there was not such a continued change of possession as to satisfy the requirements of the statute, R. S. O. ch. 118, and that the Judge had rightly withdrawn the case from the jury :

Per HAGARTY, C. J. O., and OSLER, J. A.—There being a jury the evidence was such as to require the case to be left to them.

THIS was an appeal by the plaintiff from the County Court of the County of Dufferin. It appeared that under an execution issued on a judgment recovered by the present defendant against S. B. Simpson, a married woman, wife of one J. J. W. Simpson, the sheriff seized a certain mare as the property of the judgment debtor. The present plaintiff claimed it and an interpleader order was made directing the trial by a jury of a feigned issue in the usual form between the claimant as plaintiff and the execution creditor as defendant.

On the trial the learned judge held that the plaintiff had failed to make out his title by any evidence proper for the consideration of the jury, from whom he accordingly withdrew the case and directed judgment for the defendant. An order *nisi* for a new trial was afterwards moved for on various grounds, and from the judgment refusing it the present appeal was brought, and the same came on to be heard on the 16th of October, 1885.*

* *Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

S. H. Blake, Q. C., and *E. Myers*, for the appellant.

Moss, Q. C., for respondent.

The points relied on by counsel and the other facts of the case appear in the judgments.

December 23rd, 1885. BURTON, J. A.—The only point open in this case is, whether there was any evidence to go to the jury of continued change of possession of the horse in question so as to satisfy the statute?

It was incumbent on the plaintiff who claims by a transfer from the execution debtor to shew such a possession as the statute requires, to make it valid against creditors.

It was shewn that on the day of the sale, and some hours subsequently to it, the plaintiff took the horse, together with a cutter and harness belonging to the execution debtor and drove to a neighbouring village to visit some friends, and when he returned he placed the horse in the execution debtor's stable the same as before, feeding it with her fodder, and that there was nothing to indicate any change of ownership up to the time of seizure by the sheriff.

I quite agree that change of possession is generally and mainly one of fact, and when the testimony is conflicting, or any question at all in reference to the state of facts arises, it must be submitted to the jury to find the facts, or to find for the one party or the other on a direction from the judge as to whether certain facts in evidence, if found, did or did not constitute a sufficient change of possession to satisfy the requirements of the statute, or were of a character from which such actual and continual change of possession might be inferred, it being for the jury of course to draw the inference; but when, as in this case, there is no conflict of evidence and no controversy as to the facts it becomes a pure question of law, and as such to be decided by the court.

I can see no object in sending this case down again, as I agree with the learned judge below that upon these uncontradicted facts there was no question to submit to the

jury, and the judge would again upon the same state of facts have to decide the question himself.

If it had been shewn that, although the horse was still kept in the execution debtor's stable, the plaintiff had from the time of the sale exercised exclusive acts of ownership, either by using it himself or letting it to others, acts quite inconsistent with the ownership of the execution debtor, such a change in fact as creditors or persons dealing with him could by reasonable inquiry have ascertained, such a divesting of the possession of the former owner as any man making a reasonable inquiry would be bound to know and to understand was a result of a change of ownership, then I think there would have been, as I pointed out in *Scribner v. Kinloch*, ante p. 367, a question to be submitted to the jury. Here there was admittedly no visible change and no such acts of ownership, and I am of opinion, therefore, that the question of change of possession was purely one of law and must be held to be insufficient.

The appeal should therefore be dismissed.

PATTERSON, J. A.—The question for decision is, whether the learned judge was right in withdrawing the case from the jury and giving judgment on the interpleader issue for the defendant. He could only be right in so doing, provided two events concurred: 1st, that the issue was on the plaintiff; and, 2ndly, that there was not evidence on which the jury could, as reasonable men, have found the issue in the plaintiff's favor.

If these two events concurred, the duty of the judge was to withdraw the case from the jury.

The issue was clearly upon the plaintiff.

He told his own story; and if in doing so he shewed a state of facts on which a verdict in his favor could not have been sustained, it was proper to give judgment against him without going through the form of submitting the case to the jury.

A late instance of that mode of proceeding occurred in

the case of *Davey v. London and South Western R. W. Co.*, 12 Q. B. D., 70, which was discussed in this court in *Peart v. Grand Trunk R. W. Co.*, 10 A. R. 191.

The inquiry is, whose was the horse at the time of its seizure by the sheriff? because, although with us the execution binds the property from the time when it is delivered to the sheriff to be executed, the parties have done what seems now to be very frequently done, and followed in preparing the issue the form used in England where the writ does not ordinarily bind until actual seizure of the property.

The plaintiff shewed very satisfactorily that the horse was his as against the former owner; and his case depends on what he shewed respecting the incidents which, under the Act respecting Bills of Sale, were necessary to protect his title against the creditor.

The plaintiff was working as hired man for Mrs. Simpson by whom a business was carried on, which was conducted to a great extent, if not altogether, by her husband.

In the course of that business, one Marshall bought an organ from Mrs. Simpson in part payment of which he gave the horse in question.

There were other horses belonging to Mrs. Simpson and used in her business, which were kept in a stable of which it is said the husband was immediate tenant to the owner. It was clearly for all purposes of the present inquiry the stable of Mrs. Simpson. Part of the price of the organ was paid by some hay which went to feed the horses.

The organ was procured for the purpose of the sale to Marshall, partly by means of money borrowed from the plaintiff, to the extent of \$95, for which he took Mrs. Simpson's note, her husband also joining in the note either as maker or indorser.

The plaintiff bought the horse for \$108, paying for it by giving up the \$95 note, and foregoing some wages due him.

The good faith of this transaction is not questioned, and

the plaintiff ought to recover, if the Bills of Sale Act is not in his way.

There was no writing concerning the sale; therefore it was essential that there should be an immediate delivery, followed by an actual and continued change of possession.

There was a sufficient delivery, because the plaintiff shews that some short time after he made the bargain for the horse, and I believe on the same day, he drove it to another village, not on Mrs. Simpson's business, though he had her cutter and harness, and was away for a couple of days.

He continued in Mrs. Simpson's employment, and his evidence on the point on which the matter now turns is thus noted: "Went to Rosemont afternoon of 4th February, 1884, and came back to Simpson's, and put horse in Simpson's stable, and fed horse with Simpson's hay and oats just as before. The horse was to be used as before.

* * The horse was used just as before in Mrs. Simpson's business. Said I would use it. Mrs. Simpson failed in business shortly after this, two or three days or weeks. Business stopped. I lived at Simpson's, and was engaged in the business. Parsons made the seizure on the street. I had been at the house—Henderson was at the stable—said he had heard I had the horse. I was going to River-view about the middle of the afternoon."

To understand the allusion to Parsons and Henderson, it may be explained from the evidence of those men, that they acted as bailiffs for the sheriff in making the seizure on the 26th March, 1884; finding the plaintiff at the house, one of them following him as he went to harness the horse, and refusing to allow him to take it.

Could a jury, upon this evidence of the plaintiff, have properly said that there had been a continued change of possession of the horse?

That evidence states very plainly, as I read it, that the possession of the horse when the bailiff came was precisely the same possession that existed before the sale to the plaintiff. There had been a change of ownership, and for a day or two an actual change of posses-

sion, but that change had not continued, the former possession being restored.

The statute requires not only that there shall be an actual change of possession following the sale, but that that actual change shall continue, otherwise the change of ownership shall not avail against creditors unless the alternative requirement of a registered writing is complied with.

In my view of the effect of the statute, the incident of the plaintiff's absence with the horse at Rosemont for the two days, does not assist his claim as against the statutory right of the creditor.

If he had not taken that trip, but after buying the horse had continued as Mrs. Simpson's servant to work the horse for his mistress in connection with her business, keeping it as before with her horses in her stable, it would not be possible to say that an actual change of possession had taken place, or any change but one merely constructive. It is equally impossible to say that an actual change continued after he returned from his trip and resumed the former conditions. As far as the statute is concerned, it was just the same as if no actual change had taken place.

I may apply to these facts, as detailed to us by the plaintiff himself, the language in which Sir J. B. Robinson expressed his opinion in the early days of the statute. I quote, changing only the name, from *McLeod v. Hamilton*, 15 U. C. R. at p. 113: "I take the statute to mean such a change of possession as shall be visible to others, and shall shew that the parties have acted openly and above board. Now, for all the rest of the world could tell, (Mrs. Simpson) was as much the owner of the goods up to the time of the sheriff's coming with the execution, as she ever had been."

The question before us being the application of the statute to the facts deposed to by the plaintiff, it is not to be expected that we can derive assistance from decisions in other cases where the facts were not identical. There are cases in our reports, in some of which the decision was in favor of the person asserting the actual and continued

change of possession, and in others adverse to him; but in none of them is the principle disputed which is expressed in the passage I have just quoted.

It will be recollected that until the year 1869, when the Act 33 Vict. ch. 13, (O.) was passed, there was no time (except during the short life of the statute 14 & 15 Vict. ch. 66, which was passed in 1851, and repealed the next year by 16 Vict. ch. 19), when a party to the record was permitted to give evidence unless called by the opposite party; therefore there was little opportunity for the question of procedure with which we are now concerned to arise in the earlier cases under the Bills of Sale Acts, at least in the shape in which it now comes up. Even in cases where a party was called by his opponent, the position was unlike that of the plaintiff stating himself the facts on which he relies, without depending on any other evidence to add to his own account.

The case of *Tuer v. Harrison*, 14 C. P. 449, decided in 1864, is an instance in which the plaintiff was called by the defendant. In *Doyle v. Lasher*, 16 C. P. 263, the present Chief Justice of the Queen's Bench, thus, at p. 268, summarizes the decision: "In *Tuer v. Harrison*, the claimant and purchaser had taken the horses, the property in dispute, into his own possession and kept them for a time. He afterwards let them to the vendor, who worked them. There was evidence both favourable and unfavourable to the plaintiff, and the jury found for the plaintiff. The Court would not disturb the verdict." The contest in *Tuer v. Harrison* was upon the *bona fides* of the sale as well as upon the question of possession. On the latter point the jury were directed to consider were the goods in the continuous possession of Tuer or in Charlton's possession, and in whose possession were they at the time of the seizure? If in Tuer's the jury were to find for him; if in Charlton's to find for the defendant. This charge was not objected to, and no question was raised or considered in term on any point except the judge's direction on the other branch of the contest. The case is therefore simply an

instance in which a jury found on the evidence before them that the goods were, when seized, in the possession of the claimant.

The question of continued change of possession must, of course, be decided on the facts of each case as it arises. I must not be understood to hold or to assert that the actual change of possession must in all cases continue unbroken from the time of the bargain by which the property first passes to the vendor until the intervention of the creditor or subsequent purchaser.

The two modes of securing a purchase against creditors of the vendor or his subsequent purchasers are by writing registered with the prescribed formalities, and by delivery followed by actual and continued change of possession. A defect in either mode, from want, in the one case, of some formality, or, in the other, from the possession not having been actually changed, or having been allowed to revert to the vendor, renders the conveyance voidable; but, in either case the title may be made safe by a fresh conveyance, either by writing duly registered or by a delivery of the goods, with actual change of possession continuing from that delivery onwards. The remarks which I made with reference to defective or insufficiently registered deeds in *Parkes v. St. George*, 10 A. R. at p. 535, and in *Smith v. Fair*, 11 A. R. at p. 758, apply equally to purchases without writing, where the change of possession has not been actual and continued.

If I could see in this case that there was really any question of fact for decision by the jury, I should not for a moment hesitate respecting the plaintiff's right to a new trial; but after all the consideration I have been able to give the case, both by myself and in discussion with my learned brethren, I remain of opinion that there is nothing for the jury to decide, unless they decide something different from what the plaintiff himself tells us are the facts, and we have no evidence differing from that given by the plaintiff.

It is merely putting the conclusion in another form to

say that, if the jury were asked to find the facts, they must necessarily find them as they are stated by the plaintiff. At least the plaintiff could not ask for a more favorable finding.

The effect of that finding would be what I have already stated as the evidence given by the plaintiff.

Upon that finding of fact the defendant would, for the reasons I have given, be entitled to judgment.

If I am right in that opinion, it follows that there was nothing to leave to the jury, and a new trial would be merely adding the expense of the trial, and probably of another appeal to settle the same question of law which is presented now for decision.

I think the learned judge was right in withdrawing the case from the jury, and that this appeal should be dismissed.

OSLER, J. A.—The only question we have to consider is whether under all the circumstances the judge was right in taking the case out of the hands of the jury. He could only do so if there was no evidence fit to be submitted to them in support of any question of fact on which the plaintiff's case might depend. His case was, that he was the owner of the mare, or that he had such an interest in it as entitled him to resist the seizure under the defendant's execution.

Now, that in point of fact he bought the animal from J. W. Simpson, the husband of the judgment debtor, was not denied, and he might have maintained his title by proving that it belonged either to the husband or to the wife, and, if to the latter, that the sale was by her authority and (as she was the judgment debtor,) that it was also accompanied by the usual formalities of a duly registered conveyance, or of an immediate delivery followed by an actual and continued change of possession.

The material facts disclosed by the evidence are that the judgment debtor carried on, at the village of Shelburne, the business of a fancy store and of selling organs

and sewing machines. Her husband was in difficulties and unable to do business in his own name. He acted as his wife's agent under a power of attorney, in attending to the outside business. One Marshall ordered an organ which Simpson procured from the Bell Organ Company and left with him for approval. This was apparently done in the usual course of the business as it was carried on by the wife, the organ having been ordered in her name and forwarded deliverable to her on payment of the draft attached to the shipping receipt. Marshall subsequently bought it, giving Simpson in exchange for it the mare in question, a quantity of hay and \$10 in cash. The mare and the hay were taken to the stables in which other horses belonging to Mrs. Simpson and used in the business were kept, and the money was entered in her books and used by her husband. At this time the plaintiff was in the Simpsons' employment hired, as he said, by Mr. Simpson, who was acting as Mrs. Simpson's agent, to work in Mrs. Simpson's business.

I gather from the evidence that he lent J. W. Simpson \$95 to enable him or Mrs. Simpson to repay money which had been borrowed for the purpose of paying the Bell Organ Co.'s draft. For this sum he took Mrs. Simpson's note, indorsed by her husband, or perhaps their joint note. On the 4th February plaintiff agreed with J. W. Simpson to buy the mare for \$108, which was settled by giving up the note of \$95 and crediting the balance on his wages then due, as the plaintiff said, by Mrs. Simpson. The bargain was made in the morning, and in the afternoon the plaintiff drove away with the mare to Rosemont and was absent from Shelburne with it two or three days. On his return it was put back in the Simpsons' stable with the other horses, and it was used as before in Mrs. Simpson's business, as the plaintiff said it was agreed it should be when he bought it. He remained in her employment until the 20th February.

The stable was rented by Simpson in his own name; he paid the rent.

As to the sale to the plaintiff, Simpson said: "I sold it (the mare) myself to the plaintiff without consulting Mrs. Simpson. Sometimes I consulted my wife about these sort of matters, and sometimes I did not. I can't say if she was present; she seldom interferes." He does not appear to have been asked whether the horse was his or his wife's, and she was not called as a witness.

The plaintiff's contention at the trial evidently was, that in the transaction with Marshall, Simpson had acquired the horse as his own property and not for his wife in the course of the latter's business; but that, if it was the wife's property, then that there had been an immediate delivery followed by an actual and continued change of possession sufficient to satisfy the statute. No question seems to have been raised as to Simpson's authority to sell, and on the evidence I do not see that it could have been disputed.

The objection taken in the reasons of appeal that the business though carried on in the name of the wife was really that of the husband, was not distinctly raised at the trial or in the motion for the order *nisi*, and I would not be disposed at this stage of the case to give the plaintiff an opportunity of raising it; nor is it clear that as a purchaser from the wife, setting up title under her in his affidavit of claim, and dealing with her as owner of the business, he is at liberty to do so, as against her creditors.

The learned Judge in withdrawing the case from the jury, made the following rulings or findings of fact, (1) that the organ was purchased and shipped to Mrs. Simpson, and ordered by her agent and attorney in the usual and ordinary course of her business, and was taken and delivered to her agent and attorney and hired man (the plaintiff), and exchanged for the mare in question; (2) That the said mare was taken to Mrs. Simpson's and used in her business in the ordinary way; (3) That the alleged sale was by Mrs. Simpson's attorney, and the consideration was the original joint promissory note of the Simpsons, and about two months wages due plaintiff by Mrs. Simpson; (4) That at the time of the alleged sale Mrs. Simpson was insolvent and unable to pay her debts in full;

(5) And that the sale to the plaintiff was made with intent to give him a preference; (6) That there was no actual and continued change of possession and the sale, if any, was void. Unless there was evidence on which the jury might have found that Simpson had acquired the mare as his own property in a transaction separate and apart from the business of the wife, the first three of these findings are not controverted by the defendants, and cannot well be objected to by the plaintiff as they support his title as purchaser from the judgment debtor. The 4th and 5th as to her insolvency and the intent to prefer, although questions of fact which clearly should not have been withdrawn from the jury if relied on to defeat that title, are unimportant unless there was evidence on the 6th finding of an actual and continued change of possession.

The only point therefore we have to consider is, whether these questions, or either of them, should have been left to the jury : (1) Whether the mare was the property of the husband, and (2) If on the other hand it belonged to the wife, whether there had been an actual and continued change of possession.

As to the first, I am unable to say that the learned judge was wrong. Assuming, as it seems to have been assumed at the trial, that the business was that of the wife, there is no evidence that the transaction with Marshall was not in the ordinary course of such business. The organ for which the mare was exchanged was ordered in her name, and sold and sent to her; and whatever Marshall gave for it, whether in money or exchange, would in the ordinary course of things be hers also. Nor do I see any evidence from which it could be inferred that her husband was acting otherwise than as her agent in the transaction.

The other question, namely, whether there was an actual and continued change of possession, is one which, so far as I am aware, has hitherto always been treated, whenever an actual delivery and change of possession is once shewn to have occurred, as one which ought to be submitted to the jury with a proper direction as to the law. I have not

noticed any reported case in which the contrary course has been adopted, and there is nothing in the Judicature Act or other recent legislation which enlarges the power of the judge at the trial in this respect.

In such a case as the present, the course usually followed is to explain to the jury the object of the statute, and what is meant by the term change of possession, as its meaning has been defined by decided cases. It is then for the jury to say, whether taking the whole of the circumstances of the case together, the requirements of the statute have been complied with. They may now be required to find specially in answer to questions submitted to them, and judgment may be directed for one party or the other on their findings, or afterwards set aside by the court on the whole case, under rule 321, or the judge may grant a new trial, if in his opinion the verdict or findings are against evidence or the weight of evidence or the like; but so far as regards the disposition of the case at the trial, the jury when there is one, are the tribunal to pass upon the evidence when there is any evidence for them to deal with.

I shall very briefly refer to a few of the cases bearing on this particular point.

In *McLeod v. Hamilton*, 15 U. C. R. 111, the bill of sale was made to a creditor of the grantor who lived at a distance from London where the goods were. They were never removed from the store of the assignor who resided there as before with the same clerk in his employment. The purchaser had agreed to take the assignor into his employment and give him a salary for managing the business for him. The case was left to the jury, who found for the defendant. A motion for a new trial was discharged: Robinson. C. J., saying that the only question to be asked was, whether under the circumstances there was or was not that actual and continued change of possession which is indispensable where there has been no bill of sale registered? He adds: "I am very clear there was not, for I take the statute to mean such a

change of possession as shall be visible to others, and shall shew that the parties have acted openly and above board. Now, for all the rest of the world could tell, Fraser (the seller) was as much the owner of the goods up to the time the sheriff came with the execution as he had ever been."

There is no suggestion that the case ought not to have been left to the jury, though it is in some respects stronger against the purchaser than the present.

Burns, J., says: "Does the evidence support that finding? I cannot say, after looking at the plaintiff's conduct with regard to the property, that the jury were not warranted in what they have said, or that if the evidence were submitted to another jury, there is even a probability that it would be found different."

In the same case the same learned Judge also observes: "Questions depending upon what constitutes a change of and continued possession may be illustrated by a reference to the cases on the construction of the bankrupt acts (21 Jac. 1 ch. 19, and 6 Geo. IV. ch. 16), where property is left in the possession order and disposition of the bankrupt; and such questions, as observed by Mr. Justice Buller in *Walker v. Burnell*, Doug. 320, have much more of fact than of law in them. This expression was adopted in *Lingham v. Biggs*, 1 Bos. & Pull. 89, and again in *Horn v. Baker*, 9 East 241, Mr. Justice Lawrence says: 'And therefore it seems more proper in such cases to leave it to the jury to say whether under the circumstances the bankrupt had the reputed ownership of the goods at the time.'"

In *Doyle v. Lasher*, 16 C. P. 263, Wilson, J., says: "There can be no doubt that whether there has been a continued change of possession is for the jury to determine upon the evidence." That case was an appeal from the judgment of the County Court setting aside a verdict for the purchaser and granting a new trial on the ground that the verdict was against the evidence. It is not suggested that the Judge ought to have nonsuited, although the Court above were of opinion that there had not been such a delivery or change of possession as the statute required. The same course was taken in *Heward v. Mitchell*, 10 U. C. R. 535.

In *Tuer v. Harrison*, 14 C. P. 449, the purchaser had taken the horses into his own possession and kept them for a time. Afterwards they were in the seller's possession for fifty or sixty days, hired to him, as it was said, by the purchaser. It was not clear in whose possession they were at the time of the seizure. The jury found for the purchaser, and the Court refused to disturb the verdict, though they thought a finding for the defendant would have been more satisfactory.

In *Waldie v. Grange*, 8 C. P. 431, it is laid down that "It is not a question of law but is one for the decision of the jury under all the circumstances, whether there has been an immediate and continued change of possession sufficient to satisfy the statute."

See also *Ranney v. Moody*, 6 C. P. 471; *Williams v. Rapelje*, 8 C. P. 486, and per Cameron, J., in *Scribner v. McLaren*, 2 O. R. 265, 280. "The *bona fides* of the sale, and the question whether there has been an immediate delivery and an actual and continued change of possession are questions of fact, and must be determined by the circumstances given in evidence in each case."

If I had been trying this case without a jury, I might have arrived at the same conclusion on this question as the learned Judge below seems to have done; but as there was a jury, I think, with great respect, that it should not have been withdrawn from them. The notes of the evidence as we have them are evidently somewhat compressed, but it appears that the sale was made in good faith for valuable consideration, and that there was an immediate delivery, and an unequivocal actual, visible and continued change of possession for two or three days at least. So far, therefore, the terms of the statute were fully complied with.

In considering the nature of the subsequent possession, the circumstance that the purchaser was himself living in the vendor's house, using the stable and driving the mare, could not be disregarded, nor is it clear in whose actual control the animal was at the moment of seizure. I do not mean to say or to infer that under any or all of these circumstances

a jury ought necessarily to find for the plaintiff: nor how I should deal with the case on such evidence, on a motion for a new trial; I say only that for the time being, the question was one for the jury only, and not for the judge.

I regard it as of the first importance in the conduct of a trial that the functions of both should be kept entirely distinct. In this case I think they have been distinctly confused.

For these reasons the appeal should in my opinion be allowed.

HAGARTY, C.J.O., agreed in the views expressed by Osler, J.A.

The court being equally divided, the appeal was dismissed, with costs.

MACDONALD ET AL. V. MCCALL ET AL.

*Fraudulent preference--R. S. O. ch. 118--Action by simple contract creditor
—Chattel mortgage—Subsequent assignment for benefit of creditors.*

C., who was in insolvent circumstances, made a chattel mortgage of his stock in trade to the defendants M. & Co., to secure a debt, and afterwards executed a general assignment to the defendant F. for the benefit of his creditors. The plaintiffs, who were simple contract creditors of C., and whose debts were not due, brought this action on behalf of themselves and all other creditors of C. except the defendants M. & Co., to have the mortgage declared void under R. S. O. ch. 118.

Held, affirming the judgment of FERGUSON, J., that the mortgage was void under the said statute; that the plaintiffs could maintain the action, and that it was no objection that they did not include the mortgagees among the creditors, on whose behalf they professed to sue.

Longeway v. Mitchell, 17 Gr. 190, followed.

Held, also, [BURTON, J. A., dissenting] that the circumstance that C.'s equity of redemption in the goods had been assigned to F. did not deprive the plaintiffs of the right to maintain the action to avoid the mortgage. The goods having been sold by consent, pending the action, and the money paid into court, the judgment in the court below directed the payment out of the money to F., the assignee, for distribution by him under the trust of the assignment. The judgment in this particular, was varied on the ground that the goods had not passed to F. by the assignment, and the money was left to be dealt with by the court below on application of the parties claiming it.

Per BURTON, J. A.—C. having, before execution or any other process issued, conveyed his interest in the property to F., there was no way by which a lien could be obtained upon the property by execution or otherwise, and any decree made must be fruitless, and the Court should not make a decree which it was powerless to enforce.

THIS was an action in the Chancery Division of the High Court of Justice, wherein the plaintiffs, creditors of one J. R. Cox, sued on behalf of themselves and all his other creditors, except the defendants McCall & Co., to set aside a certain chattel mortgage from Cox to McCall & Co., given as alleged when the former was insolvent and with intent to defeat and defraud, and delay his creditors and to give the defendants McCall & Co., a preference, &c.

It was further alleged that subsequent to the giving of the chattel mortgage Cox assigned his estate and effects to the defendant Ferguson upon trust for distribution among his creditors. And it was charged that this was done at the instance of McCall & Co. in furtherance of their fraudulent design and with intent to prevent the plaintiffs from impeaching the chattel mortgage.

It appeared that McCall & Co. had taken possession of the goods under the mortgage, and were proceeding to sell them, and that they were in fact the only assets available for payment of creditors.

The relief claimed was that the mortgage might be declared fraudulent and null and void against plaintiff, and said other creditors, and might be set aside and cancelled; and that it might be declared that McCall & Co. were not entitled to the goods assigned thereby or the proceeds thereof.

Before the trial an order was applied for to restrain the defendants from selling or interfering with the goods mentioned in the mortgage until the trial or other final disposition of the action. The only order made on this motion was one reserving the costs of it and reciting that McCall & Co. claimed the right to sell the goods under their mortgage to realise their debt; and that they undertook to account for the proceeds of the sale, and to pay the same into court to the credit of the action, to abide the further order of the court.

By the decree or judgment in the action, so far as it is here material to note it, it was declared and decreed (1) that the chattel mortgage in question was fraudulent as against the plaintiffs and such other of the creditors of Cox as should come in and contribute to the expenses of the suit; and (2) that the money paid into court, should be paid out to the defendant Ferguson, the assignee, to be by him forthwith distributed among the creditors of Cox under the terms of the deed of assignment.

The defendants, McCall & Co., thereupon appealed, and the appeal came on to be heard on the 17th and 19th of September, 1885.*

Robinson, Q. C., Osler, Q. C., and Geo. Kerr, for the appellants.

S. H. Blake, Q. C., and J. H. Macdonald, for the respondents.

**Present.*—HAGARTY, C.J. O., BURTON, PATTERSON, and OSLER, JJ. A.

The authorities cited are mentioned in the report of the case, 9 O. R. 185; and in the present judgments.

December 23, 1885. HAGARTY, C. J. O.—I adopt the decision of my learned brother Ferguson as to the invalidity of the chattel mortgage taken by the defendants.

In the view he takes of the evidence, and of the credibility of the respective witnesses, I think he rightly held that the instrument was void under the law then in force, viz., ch. 118, R. S. O., sec. 2, and that it fell within the words thereof as of a debtor unable to pay his debts in full, making a conveyance, &c., of his goods and chattels with intent to defeat and delay his creditors, and also with intent to give these defendants a preference over his other creditors.

I adopt the language of my learned brother in which he points out his reasons for arriving at that decision, and therefore I need not repeat. I have read his judgment more than once, and I think it correct, and based upon sound reasons.

On the point as to postponing the giving of a security until the debtor gets into a state of insolvency, or a security to be acted on if such a state should arise: see *Ex parte Fisher*, L. R. 7 Ch., at p. 641. The language of Sir Geo. Melish is applicable to this case.

Several legal questions have been raised—first the right of these plaintiffs to ask this relief. They are simple contract creditors suing on behalf of themselves, and all other creditors other than the defendants.

This is objected to, but I think is fully warranted by the practice in such cases.

It is objected that the plaintiffs cannot sue before judgment. This point was much considered in *Parkes v. St. George*, 10 A. R. 496, in this court. The case did not necessarily turn thereon.

The case of *Longeway v. Mitchell*, 17 Gr. 190, decided by Strong, V.C., in 1870, has been acquiesced in and followed for fifteen years. It was much influenced by Lord

Romilly's decision in *Reese River Mining Co. v. Atwell*, L. R. 7 Eq. 347, and I think the reasoning commends itself to general acceptance. If a creditor could not impeach a fraudulent transfer until judgment the fraud might pass unpunished, and the property pass into the hands of innocent purchasers for value.

The strongest objection urged was that as the debtor had made a general assignment of his estate to a trustee for the general benefit a few weeks after he had made the impeached chattel mortgage, this, it is contended, puts the plaintiff out of Court in this suit. It is urged that the mortgage is only void against creditors, that it is good against the mortgagor, and that his assignee has no higher right, and now represents him, and that so long as the latter assignment is unimpeached no creditor can be heard to impeach the mortgage.

It is true that the mortgage may bind the mortgagor, and that the assignee for creditors has no higher right. The law has been altered by 48 Vict., ch. 26, sec. 7 (O.), which empowers the assignee to sue for the rescission of deeds, instruments, &c., entered into in fraud of creditors or in violation of the Act respecting fraudulent preferences of creditors by persons in insolvent circumstances.

I do not, however, see anything to prevent the Court, even if it could not give any further or consequential relief, from adjudging the fraudulent mortgage to be void and of no effect as to the plaintiffs and other creditors of the mortgagor, and thus, as it were, removing it out of the way of the creditors.

As the Master of the Rolls says in the *Reese River* case (p 352): "As soon as the Court finds that a deed has been executed for the purpose of delaying, hindering, or defrauding creditors, and that it comes within the statute, it sets the deed aside, but it goes no further; and the plaintiffs must take some independent proceedings if they wish to have execution against the property in this deed."

Vice-Chancellor Strong's language may be quoted (17 Gr. 193): "Lord Romilly, drawing the line between merely

setting aside the deed as fraudulent against creditors and the consequential relief of equitable execution, decreed the former, but refused the latter relief, thus determining that whilst any creditor is entitled to have a deed which an Act of Parliament has enacted shall be deemed fraudulent as to all creditors, without distinction of priority, set aside, no creditor is entitled to resort to a court of equity to have execution for his debt, unless he has first perfected his title at law ; a distinction which is very obvious and one which certainly commends itself to common sense."

If we adopted the course of merely declaring this chattel mortgage to be void as against creditors, removing it, as it were, out of the creditors' way, then the objection is urged in the language quoted by Strong, V. C., from the argument of counsel : " A plaintiff is not entitled to a decree where he is in a position only to obtain a declaration which might be barren ; he must be in a position to obtain the fruit of it."

I do not think any such argument should prevail. I do not decide that we should limit our judgment to this simple declaration of the mortgage being void as against plaintiffs, but I think we have the right to do so.

As far back as 1852 the Imperial Parliament by 15 & 16 Vict., ch. 186, sec. 50, declared that courts might make binding declarations of right without granting consequential relief. Last session our Legislature, by 48 Vict., ch. 13, sec. 5, enacted : " No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not." This Act was passed 30th March, 1885, three or four weeks after the judgment appealed from was pronounced.

But I do not think that this should prevent us in giving our judgment from refusing to apply to this case this amendment in procedure. It will be observed that our statute goes beyond the Imperial as it applies to cases where no consequential relief is or can be claimed.

This distinction should be remembered when we read such cases as *Rooke v. Lord Kensington*, 2 K. & J. 753, and *Bristow v. Whitmore*, 4 K. & J. 743, where Wood, V.C., comments on the effect of this Act, giving it a construction which James, L. J., considers rather a narrow view in *Cox v. Barker*, 7 Ch. D. 370.

I do not think we can properly stop with this declaration. It is urged that the plaintiffs do not specifically pray relief beyond declaring the mortgage void, and that defendants (McCall) are not entitled to the goods and chattels or the proceeds thereof, and that the further relief is going beyond what is asked.

No such objection, so far as I can see, was taken below, and if taken I think my brother Ferguson would have made every proper amendment. Nor is it taken in the reasons of appeal.

I think we are bound to dispose finally of all the matters in controversy between the parties before us, under the present system of practice.

I am much impressed by the vigorous and far seeing language of the late Sir George Jessel, in which he points out the apparent scope and meaning of the Judicature Act in *Salt v. Cooper*, 16 Ch. D. at p. 549, where he says "It was not any fusion, or anything of the kind; it was the vesting in one tribunal the administration of law and equity in every cause, action, or dispute which should come before that tribunal. That was the meaning of the Act.

* * 'The High Court * * shall have power to grant, and shall grant, either absolutely, or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.'"

"Those" (he says) "are very large terms. The clause clearly applies to any remedy whatever; for it says the

court shall grant, all such remedies whatsoever.' * * I may mention, also, that it says distinctly, 'as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the cause or matter.' It is not merely the original claim: it is any claim, &c., that is to say, any claim as regards the 'cause or matter' pending."

He refers to the old procedure. "As a rule your right to recover a money demand could only be fully recognized in a Court of Law. * * As a rule, when you had a mere money demand, you were compelled to bring an action in a court of common law to recover it; and then, when you had got your judgment, you were compelled to bring a new action—then called a suit in equity—by bill to enforce the judgment. Now that appears to me the very imperfection which the Judicature Act was intended to remedy: you were not to be obliged to go from one court to another upon such a simple matter as the enforcement of a judgment. * * The court is to grant all such remedies as the parties may be entitled to in the matter pending, 'so that as far as possible all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. The very object of transferring the jurisdiction to one court was that it might do everything without the necessity of going to another court."

Reading the statutable text with this vigorous commentary, I cannot see why creditors cannot apply to a court on a state of facts such as are now before us. They cannot wait to get judgment without endangering the loss of all possible means of payment. They are ready to prove their claims.

I think they ought not to be told to go and prove them in another division of the same court.

They also ask to have a fraudulent disposition made by their debtor of the bulk of his property removed out of their way. They bring all proper parties before the court. The property by arrangement is sold and the proceeds in money paid into court. I think the whole matter is in the

hands of the court, and every remedy, legal or equitable, should be granted, so that the evident object of the act shall be attained for the final determination of the whole matters in controversy and the avoidance of multiplicity of suits.

It is urged that the debtor, after making the fraudulent mortgage, conveyed all his property to the trustee Ferguson for the general benefit of his creditors: that he himself could not be heard impeaching the mortgage, and that his assignee Ferguson has no higher right than he had.

I hesitate long before admitting that this action of the debtor in effect validates the mortgage, which the law declares void as against creditors, and leaves the same class of creditors to look merely to the residue of the estate in the hands of the assignee. In the present case, this in fact leaves next to nothing for the creditors. I am not aware of any decision, certainly nothing has been cited to us, supporting such a view, and I may express a hope that the law is not so helplessly decrepit as to allow such an extraordinary and unjust result.

If the mortgage was avoided under 13 Elizabeth, the mortgagor is declared to be liable to criminal proceedings by indictment with severe punishment, and to a *qui tam* action to recover back as penalty the value of the goods, &c.: *Meux v. Howell*, 4 East 1.

His offence is complete in the commission of the wrongful act, and the deed is so much waste paper as against the creditors. He certainly cannot by any act of his own purge his offence. Can he, by executing a deed of some trifling residue of his property to a trustee for those very creditors, in effect make good the fraudulent mortgage?

His assignment to Ferguson on 1st May professes to assign for the benefit of creditors the whole of his stock in trade, and all his goods both in his shop in Chatham and in Dresden, and all his real and personal estate, with covenant for further assurance.

The mortgage made about six weeks previously assigned the same stock in trade with the same local description.

The assignment to Ferguson reads as if he were the owner absolutely of all, and would convey every interest which Cox had, including his equity of redemption in the goods. It professes to be for the general benefit of the whole body of creditors.

Now if a mortgage previously given by Cox to a preferred creditor is declared by statute to be null and void as against such body of creditors, it is difficult to understand why as in favor of such body, the assignment of the same property, or at least an equitable right therein should not enlarge, as it were, the estate vested in the trustee for the express benefit of that body of creditors.

It must be some purely technical rule that can prevent a result dictated by the plainest rules of right.

As I said before there seems little express authority to help us.

In *Meriden Silver Co. v. Lee*, 2 O. R. at p. 456, the learned Chancellor assumes that where an execution was set aside in an interpleader issue at the suit of a subsequent execution creditor, and between the impeached execution and the subsequent execution the debtor had made an assignment for creditors, the result would be that the goods seized on the fraudulent execution would "be intercepted by the assignment for the benefit of all creditors, and so be ratably distributed." But the case did not turn on this, and besides it was an execution and not a transfer of goods that was impeached.

The same learned Judge in *Parkes v. St. George*, 2 O. R. 342, held that "the effect of declaring the mortgage invalid is to allow the goods covered by it to fall into the general assignment for the benefit of all the creditors," citing *Richards v. James*, L. R. 2 Q. B. 285, which I hardly think supports the proposition.

My brother Patterson remarks on this view of the Chancellor, 10 A. R., at p. 530: "The fallacy which seems to me to govern this finding is in treating the avoidance of the mortgage as giving to the assignment a larger effect than an assignment of the equity of redemption."

This latter remark is in one sense undoubtedly true.

The mortgagor cannot dispute his mortgage. His assignee, as the law then was, has no higher right.

The question before us is not whether we are to give effect to any claim of the assignee to attack or impeach the mortgage so as to give him an enlarged estate.

One substantial question is, what is the legal result of the facts before us ?

Is the law in such a deplorable state that when the mortgage is properly declared void as against creditors, a formal assignment to a trustee of the same goods for the sole purpose of equal distribution amongst creditors (in itself a proper and meritorious proceeding), has the effect of, in substance, setting up and validating the fraudulent mortgage? I think we are bound to resist such a preposterous result by every possible legal intendment.

If Cox in the conveyance to Ferguson had recited the outstanding mortgage to McCall and simply professed to convey his equity of redemption or any remaining interest or property, there would apparently be no conveyancing difficulty, as he did not convey the property conveyed in the mortgage.

If the day after executing the McCall mortgage he made his will, expressly devising all his personal estate without exception, specially designating the very stock in trade in the mortgage to Ferguson in trust to pay all his creditors ratably, and died still in possession, the property in the mortgage would, as against creditors, be held to be assets available for them.

We are told that the law makes a distinction between a living and a dead debtor in dealing with assets: *French v. French*, 6 DeG. M. & G. 95.

Lord Cranworth points out how one portion only of a deed may be held void, as against creditors, and other portions upheld, and this though the creditor impeaching the portion himself took the benefit of another provision in the same instrument. He says p. 102: "The plaintiff remains a creditor, and as such has a right to impeach that portion

of the consideration which has been withdrawn from the creditors generally."

Hue v. French is a case arising out of the same transaction before Kindersley, V. C., 26 L. J. N. S. 317.

He says p. 319: "The manner in which courts of equity construe the statute is that the instrument by which a debtor makes a voluntary assignment (assuming it to be fraudulent as against creditors), is to be regarded as if it had never existed. In *Roberts on Fraudulent Conveyances*, ch. 5, sec. 5, p. 591, it is said that the construction of these conveyances has always been to treat the fraudulent gift as void, as if it had never been made. The same proposition is laid down in *Shears v. Rogers*, 3 B. & Ad. 362."

This latter case declared a deed by a fraudulent intestate under the statute was void, so as to leave the property as assets in the hands of an executor. Lord Tenterden says: "The authorities shew that wherever a man makes a gift of goods which is fraudulent and void against creditors and dies, he is considered to have died in full possession with respect to the claims of the creditors, and the goods are assets in the hands of his executor." Tomlin, J., "The assignment is utterly void and frustrate against creditors, and the case is to be considered as if it had never been executed. The intestate, therefore, died possessed of the lease, and it was assets in the hands of the executor: *Bethel v. Stanhope*, Cro. Eliz. 810, if any authority were necessary, is expressly in point as to this." Patteson, J.: "As the statute says that the fraudulent deed shall be utterly void and frustrate, and as the lease was in the hands of the testator at the time of his death, it passed to the executor and was assets in his hands."

In *Bethel v. Stanhope* it was held: "The gift of the goods is in itself fraudulent, &c., and then it is utterly void against the creditors by 13 Eliz., and the intestate died possessed of them, and when the donee afterwards took them it is a trespass against the administrator, for which he has his remedy, and they are always assets in his hands * * ; wherefore, notwithstanding the taking

of them by the donee yet they always remained as assets in the hands of the administrator."

Patteson, J., says, in *Shears v. Rogers*, already cited: "If the defendant had not been executor, then, by the assignment in question, he would have been executor in his own wrong and chargeable by the creditors in respect of the property taken by him under that instrument."

See 2 *Williams* on Executors, 1551. The writer (citing *Shears v. Rogers*) says: "An assignment within the Statute of 13 Eliz. is utterly void against creditors, and the property assigned is assets in the hands of the executor."

There is a rather remarkable case of *Blenkinsopp v. Blenkinsopp*, 12 Beav. 586, before the Master of the Rolls, affirmed by the Lords Justices, 1 DeG. M. & G. 500, shewing the manner in which the court dealt with a deed of property to trustees to pay certain valid claims, and also defeating the claim of the plaintiff, the wife of the settlor. It was declared void as against her, and the decree directed the trustees to pay her claim out of the trust funds.

In this case the court sent for and obtained the decree in *Huggins v. York Buildings Co.*, 2 Atk. 107, which was the case of living debtors, and is worthy of note as shewing the manner in which the court dealt with a large body of judgment creditors.

The result of the whole controversy before us seems to me to be: Does the mere fact of the debtor making this general assignment to Ferguson prevent his creditors generally from reaching what may be called his whole estate, and thus enable McCall & Co. to have it for their sole benefit by means of a security which the law has declared void as against these creditors? This seems the whole question in its naked deformity.

If a fraudulent assignment to a particular creditor can be validated by this simple conveyancing juggle, we may express surprise that so easy a course has not been more frequently followed.

In the case before us the property in dispute, or rather its sale proceeds, is in court. The assignee Ferguson makes

no claim, submitting, as it were, to the judgment of the court. Conceding to the full extent that neither he nor his assignee can be allowed actively to impeach the fraudulent mortgage, I am still of opinion that the court has a right to deal with the estate. The proceeds being in court render it more easy, but even without that I think justice can be done. All the parties interested are in court—the mortgagor, the mortgagee, the creditors, and the trustee for creditors. He has undoubtedly had conveyed to him an interest in the property, the right to redeem the mortgage—what is left for him to redeem? The court declares the mortgage void as against his *cestuis que trustent*. No other interest is involved. When the court declares the mortgage void against the creditors it is not easy to understand that the trustee can be permitted to retain the whole proceeds of the sale, and thereout to pay the fraudulent and void mortgage.

I am unable to grasp the idea that the trustee can hold the estate still incumbered by this mortgage claim which is pronounced void. If he do not so hold it, how then does he hold it? I hardly see my way to hold that the decree is to be limited to declaring the deed void as to creditors.

Merely to declare the mortgage void would not dispose of the fund in court, nor would it satisfy the Judicature Act.

I find great difficulty in regarding Ferguson in any different position than Cox. He takes no beneficial interest—he is the mere nominee of Cox to do what Cox himself ought to have done, and only (as I view it) the most extreme technicality can alter the operation of the claims of judgment or other creditors of Cox as regards the property assigned professedly for their benefit.

I am not concerned to discuss how this case might be if Ferguson were a purchaser for value of the equity of redemption.

I deal with the case as it is, and I am wholly unable to adopt the view assuming that McCall had obtained posses-

sion of these goods on his mortgage, as it would seem that he did, and while in his hands the sheriff seized them on an execution at the present plaintiffs' suit; he could only defend himself on the mortgage, and if that were declared fraudulent the goods would have been effectually sold as against him. I do not see how he could raise any question as to any right or title in Ferguson.

The goods have been converted into money by the sale under McCall's mortgage, the latter agreeing to pay the proceeds into court, according to the order made on motion for injunction to restrain them from selling.

I think the fund in court must be dealt with on the same principle as the goods themselves, and be applied substantially in the same manner as the goods would have been by sale on legal execution; that the creditors have a right to apply to the court as in the case of equitable execution against this fund, irrespective of any claims of Ferguson thereto, until the judgment creditors were satisfied.

In the shape in which the property mortgaged to McCall is I do not see how it can be reached except by the aid of the court. No creditor who had no specific lien would be permitted by the court to receive benefit from this asset except on equal terms with the rest of the class.

I think the court can deal with this matter and allow each creditor to prove his claim in the Master's office. In the present state of the law, if not in the past, I think there must be this power, and the parties should not be left to prove their claims in other actions. If at any time before an execution has been lodged McCall had sold and converted into money the mortgaged property I do not see how the execution creditor could get anything on his *fi. fa.*, the money not being "ear marked," so that the sheriff could reach it. Except through the aid of equity, I hardly see what could be done.

I have come to the conclusion that the court can deal with the case substantially as my brother Ferguson has decided. I do not accede to the argument that such a

remedy and such a disposition of the estate among creditors is confined to an administration in the case of a deceased debtor.

I would gather from such cases as *Taylor v. Jones*, 2 Atk. 600; *Goldsmith v. Russell*, 5 DeG. M. & G. 547, although there is no discussion on the point, that such a proceeding has not been wholly unknown.

I think we should vary the decree as to paying out the money in court to Ferguson the assignee to distribute among the creditors. Except by consent of parties I think it is the court that should administer the fund.

In consequence of difference of opinion in this Court there can be no decision if we all adhere to our views without compromise.

I therefore concur in an order dismissing the appeal, with costs, but confining its operation to declaring the mortgage void against creditors, with costs, against the defendants according to the memorandum given to our registrar.

BURTON, J.A.—The plaintiffs who were simple contract creditors of one Cox, seek in this action a declaration that a chattel mortgage given by Cox to the defendant McCall may be declared to be fraudulent and void as against themselves and the other creditors of Cox.

This, as I understand the authorities, is the utmost extent to which the court goes when a bill of this nature is filed by a creditor who has not acquired a lien on the property, and the plaintiffs, as I think very properly, confined their prayer to that relief.

The plaintiffs' contention, as I gather it from the reasons against the appeal, is that after such a declaration the debtor is disabled from exercising any control over or making any disposition of the property, a position which I take it is clearly untenable.

In the cases which have been decided on the authority of *Reese River Mining Co. v. Attwell*, L. R. 7 Eq. 347, the rule laid down by Lord Romilly has been strictly adhered

to, that whilst the court will make the declaration prayed for it goes no further, but leaves such of the creditors as desire to do so to take such independent proceeding as they may be advised if they desire to have execution of the property comprised in the impeached instrument.

The creditors, or some of them, may have no reason to resort to that property for the satisfaction of their claims, and in that case the declaration amounts to nothing more than that contained in the statute, although the plaintiff may if he chooses, and in order to make the decree effectual, obtain an injunction to prevent the grantee in the fraudulent instrument from parting with his security or selling the goods comprised in it.

But until a creditor obtains a lien either by execution or in some other way, the declaration as regards the debtor is a very barren proceeding.

It is shewn in this case, and is admitted, that before any execution or other process did issue, the debtor conveyed his interest in the property to the defendant Ferguson for the benefit of the creditors who have assented to and adopted the assignment.

Under these circumstances it appears to me that any judgment which this court could give would be necessarily fruitless. I know of no way in which a lien could be obtained upon this property by execution or other process, and though that may disclose an undesirable state of things, that is a question with which we have no concern but is a question for the legislature, and the legislature in England, not long ago, and the legislature here have, since this action was brought, interfered by placing assignees under a deed for the benefit of creditors in the same position as assignees in insolvency.

It is quite settled that a judgment creditor can take no interest whatever either legal or equitable beyond what he acquires from the debtor, and when he proceeds by execution to enforce its recovery he takes the interest of the debtor precisely in the plight in which he finds it.

If when that execution was placed in the sheriff's hands

the only thing in his way had been the mortgage that had been declared void, he would have been in a position to sell the entire interest in the goods; but at that time the debtor had ceased to have any interest by reason of an assignment which was valid against all parties. There was nothing, therefore, upon which an execution could attach.

We are all familiar with cases in which where the debtor is beneficially entitled to property, the legal title to which is in another, a court of equity interfered by granting equitable execution, but that is very different from this case. The debtor here had no interest in the goods beyond that which he assigned to Ferguson; as between him and McCall there is a mortgage for a good consideration, and free from any taint except that it is liable to be impeached by any creditor who is in a position to lay hands upon it under legal process.

The combined effect of the mortgage which is good against him and the assignment which is good against every one is to prevent any one seizing, as there is no interest left in the debtor to seize.

I am not sure that any great wrong is done to any one by this accident. It is quite possible that some creditor other than the plaintiffs, whose debt did not mature for some months, might have obtained execution first and swept off everything; it would have been a mere transfer of the preference perhaps to a less meritorious claimant. It is one of the results of endeavoring in a country which claims to be commercial to carry on large business transactions without a bankruptcy law.

The legislation which declares such instruments as that sought to be impeached void as against creditors, if made with intent to give a preference, has received an interpretation, which I think still is correct, in *Parke v. St. George*, that they are not absolutely void but void only as to those parties who are in a position to assert their rights by execution or other process.

Take this case, a declaration is now made that this mortgage is void as against creditors.

In the meantime some other property of the debtor is discovered, which is ample to satisfy the claims of all creditors. Is this mortgagee to be tied up and prevented from realising his security under such circumstances? Certainly not. It is clear therefore that although voidable at the instance of a creditor who can lay hands upon it, it is not absolutely void.

If instead of an assignment for the benefit of creditors it had been a sale of the equity of redemption, how could a creditor have obtained a lien?

These are questions with which we have nothing really to do in this case except in this view. I wish to shew that there is really no possibility of reaching this supposed interest of the debtor, and if so, any decree we may make must be fruitless, and it is and ought to be beneath the dignity of this court to make a decree which it is powerless to enforce, and which must necessarily be futile.

For these reasons, I am of opinion we ought to allow the appeal and dismiss the plaintiffs' bill, with costs.

I have not noticed that part of the decree which provides for the money being paid to the assignee. I should suppose that the decree was inadvertently so drawn, as I find no reference to such a decree in the learned judge's reasons, and it appears to me to be entirely opposed to principle and authority.

A case referred to by the Chief Justice in 11 Hare is authority, if any were wanted, against such a position.

There a debtor made a voluntary assignment of both real and personal estate which would have been void under the 13th Eliz. as against creditors. He subsequently assigned and conveyed the same property to a mortgagee in trust for a subsequent creditor. It was held as to the real estate that the voluntary settlement was void as against the trustee under the 27th Eliz., but as that statute does not apply to personal property, the question arose whether the assignment of the personal

property was not void as against the trustee for the creditor under the 13th Eliz., and although the doctrine was referred to under which it has been held that when a voluntary settlement is once avoided under that statute subsequent creditors are let in, together with those creditors against whom the settlement was fraudulent, it was held that a creditor who merely claimed as this creditor did as mortgagee could not be heard to impeach it; as to him, the settlement was good. If the creditor had obtained a judgment and execution he might have obtained possession of the goods, but the creditor claimed under the assignment to the trustee only, and under that he could not acquire any right to the goods.

In other words the settlement there, as the mortgage here, was good against the assignee although that assignee represented a creditor who might in a proper proceeding have impeached the settlement.

I have formed no opinion as to whether the mortgage to McCall was or was not liable to be impeached as obnoxious to the provisions of the statute of Elizabeth or our own statute, it not being necessary to do so in my view of the case. I will merely say that I was not so clearly convinced of its invalidity upon the argument as the learned Chief Justice appears to be after considering it.

The payment into court does not confer any jurisdiction to deal with it as a fund under its control. The money so paid in simply represents the goods, and must be dealt with precisely in the same way as if the goods were still in specie; if they could not have been seized in execution, the money cannot be reached.

At most the court could only make a declaration of the invalidity of the deed as fraudulent, but for reasons I have given I think such a declaration should not under the circumstances be made, but the bill should be dismissed and this appeal allowed, with costs.

PATTERSON, J. A.—The prayer of the plaintiffs is that a chattel mortgage made by Cox to the defendants D.

McCall & Co. on 22nd March, 1884, may be declared to be fraudulent, null and void as against the plaintiffs and the other creditors of Cox, on whose behalf they sue, and may be set aside and cancelled, and that it may be declared that D. McCall & Co. are not entitled to the goods and chattels covered by that mortgage or to the proceeds thereof.

The formal judgment as drawn up grants all that is asked in the claim, declaring the mortgage fraudulent and void as against the plaintiffs and such other of the creditors of Cox as may contribute to the expenses of this action; and it goes on to order something further.

The facts were stated, and either proved or admitted, that the plaintiffs were simple contract creditors only, and their debts were not due when the action was begun, and that on the 1st of May, 1884, which was before action, Cox made a general assignment to the defendant Ferguson for the benefit of his creditors.

The further order contained in the judgment is as follows :

“ 3. And it appearing that the defendants D. McCall & Co., have, under the chattel mortgage aforesaid, sold the goods and chattels covered thereby, and that, under the terms of an order made in this action and dated the sixteenth day of May, 1884, they have paid into court to the credit of this cause the amount realized under the said sale, to wit, the sum of \$5,000; this court doth order and adjudge that the said sum of \$5,000, together with interest accrued thereon, be forthwith paid out of court to the defendant Ferguson, to be by him forthwith distributed among the creditors of the defendant Cox, under the terms of the deed of assignment from the defendant Cox to the said defendant Ferguson, having regard to the provision hereinafter contained as to the costs of these proceedings.”

I am not sure that I understand the reason for making this order to place the money in the hands of Ferguson. I find nothing in the judgment delivered by the learned judge to explain his view on the point, or even to shew that it was before his mind. He repeats at the end of his judgment the prayer for relief contained in the statement of claim, as I have already stated it, and says that to that

relief he thinks the plaintiffs are entitled, but says nothing like what we find in the further order for payment of the money to Ferguson.

The defendants D. McCall & Co. appeal. Their main contest is upon the validity of their mortgage. If they cannot hold it, it is for their interest that a distribution in which they will share shall be made of the fund. *The Bank of Upper Canada v. Thomas*, 2 E. & A. 502, would be, I think, an authority for their sharing with the other creditors, notwithstanding their ineffectual attempt to appropriate the whole fund to themselves. They do not object to this part of the judgment. On the contrary, they base an argument, which I shall notice by and by, on the assumed right of the assignee to the fund, or the goods which it represents, in the event of the mortgage being set aside.

The plaintiffs in their turn insist on the propriety of the direction which they have had inserted in their decree, that the fund shall be handed over to Ferguson. They do this in their reason No. 3 against the appeal, putting the right on two grounds, to explain which I shall read the reason from the printed appeal book; one ground treating Ferguson, if I correctly apprehend it, as a sort of officer of the court, and the other as a legal owner of the goods that produced the fund in court:

"3. The fund, the proceeds of the sale under the impeached mortgage had been paid into court before judgment and was at the date of the judgment made subject to the order of the court. The direction that the fund should be paid out to the defendant Ferguson for distribution among the creditors was merely a mode adopted for the purpose of carrying into effect the judgment of the court—whether the fund be distributed by Ferguson the assignee, or by the master or other officer of the court, is an immaterial matter. The court having complete control of the fund the proceeds of the property embraced in the impeached chattel mortgage was empowered to deal therewith and was bound to direct it to be paid out to the person found entitled thereto."

It may, notwithstanding this consensus among the

parties to the record, be necessary, in dealing with the questions we have to discuss, to form our own opinion of this mode of disposing of the fund. In the meantime I merely note the attitude of the parties with regard to it.

On the main contest, I do not know that I can usefully add any remarks to those made by the learned judge in the court below, in which he explained the grounds on which he held that the mortgage offended against both branches of R. S. O. ch. 118, sec. 2, as being made with intent to defeat or delay the creditors of Cox other than the mortgagees, and with intent to give the mortgagees a preference over the other creditors, though I fancy that as the last mentioned intent covers the whole ground, and does not involve any question of the effect of the mortgage being for good consideration, it is not necessary to rely on the other.

There has not been shewn to us any sufficient reason for questioning the finding of the learned judge on that part of the case. I should from the evidence come to the same conclusion.

But objections are raised to the right of the plaintiffs to maintain the action.

One objection is that the plaintiffs, if entitled, while only simple contract creditors, to sue, can only sue as representing *all* the creditors, while they profess to sue only for all the creditors except the defendants.

This objection strikes me as originating in some confusion of ideas, which may very naturally arise from the recognition of the right of a simple contract creditor of a living debtor to maintain an action of this kind, when he is not proceeding to judgment for his debt, and when by reason of the debt not being payable at the time of the commencement of the action, he was not at that time in a position to bring an action against his debtor.

If the action is to be regarded as for the purpose of setting aside the mortgage so that it shall not stand in the way of the realisation of their debts by the creditors, the mortgagees would be out of place as plaintiffs. The mortgage does not stand in their way.

D. McCall & Co. who make the objection are before the court; but without placing much stress on that circumstance, it seems to me impossible that a demurrer could have been sustained upon this objection. See *Fraser v. Cooper*, 21 Ch. D. 718.

The judgment as entered places D. McCall & Co. on precisely the same footing as the other creditors.

This technical question of parties is, of course, a distinct matter from the propriety of the judgment in other respects, which has to be considered in its turn.

A second objection is put in the reasons for the appeal in these words:

"2. But further, the plaintiffs being merely simple contract creditors, are not entitled to maintain this action, because they do not show that they have any debt due, or any claim upon which they are proceeding to judgment against Cox, and that the mortgage in question will hinder or delay them from realizing by execution on such judgment. On the contrary, the statement of claim (paragraphs 13 and 17, p. 5, Bk.) alleges, that prior to the commencement of the action, Cox assigned his whole estate and effects to the defendant Ferguson, who claims the goods; and whose position they do not seek to disturb, and therefore, any execution which they might obtain against Cox would be ineffectual against these goods."

We have here two positions taken. The first is that a simple contract creditor whose debt may not be due, and who cannot assert that he either has recovered judgment, or is proceeding to do so, cannot sustain an action to set aside a conveyance as being void against creditors under 13 Eliz. ch. 5, or R. S. O. ch. 118.

The objection, to this extent, is answered by the decision in *Longeway v. Mitchell*, 17 Gr. 190, which is the leading case in our courts on this phase of the subject.

I had occasion, in *Parke v. St. George*, 10 A. R. 496, to make some remarks respecting that case. I shall now merely add that I find that I was correct in understanding that the case had always been followed, and that it must be taken to lay down the law of our courts.

The principle is the same on which I founded, to a con-

siderable extent, the opinion I expressed in *Re Barrett*, 5 A. R. at p. 215, namely, that a conveyance which the law declares void against creditors, not saying *judgment* creditors, is always void against the creditors, although no creditor can interfere with the property until he obtains process for the collection of his debt.

The creditors obtain a decree declaring the invalidity of the conveyance as against them, but must take some independent proceeding to get hold of the property, whether that proceeding is by execution at the suit of an individual creditor, or by seizure by some one who, like an assignee in bankruptcy, may be entitled to act on behalf of all the creditors. See judgment of Vankoughnet, C., in *Bank of Upper Canada v. Thomas*, 2 E. & A. at p. 513, when he quotes from Lord Hardwicke's judgment in *Huggins v. The York Buildings Co.*, 2 Atk. 107; and see *Reese River Co. v. Atwell*, L. R. 7 Eq. 352.

The second position taken is that these plaintiffs cannot have recourse by execution against the goods because of the assignment to Ferguson; and this is pushed to a rather paradoxical conclusion.

It is not asserted that Ferguson could attack the mortgage which is good against Cox, under whom alone he has title. He has no such right as is now given to assignees for the benefit of creditors by 48 Vict., ch. 26, sec. 7, (O.) Nor is the argument embarrassed by any question touching the superior position of judgment creditors over simple contract creditors, for the character of the debt is not one of the data in this position. But the contention is that if the deed is set aside the assignee will take the property, and the creditor cannot touch it with his execution; therefore the deed does not stand in the creditor's way, and he cannot be heard to ask to have it set aside; and inasmuch as the assignee, who has no greater rights than his assignor, cannot avoid it, it must stand good against all those against whom the law declares it to be fraudulent and void.

This startling proposition is not put forward as one of

those unexpected results which are sometimes the effect of statutory provisions that do not dove-tail well together, of which an instance is found in *Re Blaiberg*, 23 Ch. D. 254, which was cited to us by Mr. Robinson. In that case there was an unregistered bill of sale which, under the Bills of Sale Act, 1878, was to be deemed fraudulent and void against, *inter alios*, trustees or assignees in bankruptcy and execution creditors, so far as regarded any property comprised in it, which, at or after the time of filing the petition in bankruptcy or executing the writ of execution, was in the possession or apparent possession of the person who made the bill of sale. The debtor signed a declaration of insolvency which was filed one afternoon at 12.30. At 2.30 the sheriff seized the goods under an execution, and at 3.15 on the same afternoon a bankruptcy petition, founded on the declaration as an act of bankruptcy, was presented. The Bankrupt Act, 1869, (s. 11) made the bankruptcy relate back to the time of the completion of the act of bankruptcy, which was before the seizure by the sheriff, and also declared (s. 12) that when a debtor should be adjudicated bankrupt, no creditor to whom the bankrupt was indebted in respect of any debt provable in the bankruptcy should have any remedy against the property or person of the bankrupt in respect of such debt, except in manner directed by the Act, with a saving (s. 95) in the case of an execution or attachment executed by seizure and sale of the goods before the date of the order of adjudication, if the creditor had not at the time of the seizure and sale notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication. The effect of this was to sweep away the execution, and the goods would have gone to the assignee in bankruptcy if nothing had happened but what I have stated. Something more, however, did happen, namely, a taking possession of the goods by a bailiff sent by the holder of the bill of sale, immediately after the sheriff's seizure, and before the filing of the petition. Therefore when the petition was filed, the goods were not in the possession or apparent possession of the

person who made the bill of sale, and that instrument consequently remained good against the assignee.

The bill of sale holder there profited by the accident of the one statute, by the relation back to the act of bankruptcy, annulling the execution as of a date earlier than the seizure, while the operation of the other statute depended on the state of the possession when the petition was filed, without any relation back.

We have another instance in *O'Brien v. Brodie*, L. R. 1 Ex. 302, where an analogous provision of the Bankruptcy Consolidation Act, 12 & 13 Vict. ch. 106, was in question. The sale under the execution in that case was stayed by an interpleader order, and by reason of that stay, had not taken place when the bankruptcy occurred. The court nevertheless felt bound to give effect to the statute which deprived the creditor of the benefit of his execution.

In the present case we are asked to hold that the intention of the legislature that the goods covered by the deed shall be assets for the payment of the debts of the person who made the deed is frustrated, not by the inevitable force of some other legislative provision, but by something done by the debtor himself in the conduct of his own affairs, and not under any bankruptcy law, or as an act to which the statutes attach any effect that did not belong to it at common law.

We cannot so hold consistently with the terms of the statute R. S. O. ch. 118, sec. 2.

We must not lose sight of the important fact that the mortgage is always binding on the person who makes it. What he parts with is gone from him, and does not return to him or within his control; the transaction is avoidable only as against creditors, and only so far as necessary to satisfy their claims; and the debtor's assignee can take nothing beyond what his assignor can give, which is simply the equity of redemption.

Does the statute apply to mortgages, or only to absolute transfers? This question is answered by the uniform understanding on which the statute has been acted upon

in our courts both of law and equity. A large proportion, probably a majority, of the transactions set aside under the statute have been mortgage transactions. Then let us see how the statute regards mortgages. What it avoids is a *gift, conveyance, assignment, or transfer* of goods, chattels, or effects, and a *delivery or making over* of bills or securities.

The statute, therefore, looks at a mortgage, not with the eye of a court of equity, in whose contemplation the property remains in the mortgagor charged with the debt, but with the eye of a court of law which regards the property as passing from the mortgagor to the mortgagee, subject to be revested on payment of the debt.

The statute deals in terms with what may be called the legal estate in the property. The transaction which it avoids is one by which the ownership passes from the debtor as between him and his transferee, and it declares in effect that notwithstanding the transfer, moved by the forbidden intent, the creditors may resort to the property for satisfaction of their debts.

It matters nothing to this argument by what process the creditor is to reach the property, whether by execution in the sheriff's hands or by the aid of some proceeding in equity. The important point is that the property has passed from the debtor, and therefore cannot by any subsequent act of his vest in his assignee, but is assets for the satisfaction of the creditors, and liable to be pursued by them; and, therefore, the particular objection in discussion is left without foundation.

There would have been no practical difficulty in the way of the sheriff seizing the goods if he had had an execution shortly before the commencement of this action. The mortgagees, whose title was absolute at law as against Cox and Ferguson, had taken actual possession. Mr. Ferguson tells how it happened. The assignment was made on the 1st of May, and he went up to Chatham and went into possession of the store, having with him a copy of the chattel mortgage, and acting in all he did under the instructions of the

solicitors for the mortgagees. He did not take possession for the mortgagees, but after he was there Mr. Whan, an auctioneer, did so. This is Mr. Ferguson's evidence :

Q. Who was in charge of the goods for the chattel mortgage? A. James Whan.

Q. There before you came? A. No, after I came.

Q. After you came what did Whan do? A. He came in and took possession under the chattel mortgage.

Q. After you went up to Chatham and were in the store? A. Yes.

Court—Q. Did you endeavour to prevent him taking? A. No.

Mr. Osler—Q. You had heard of the chattel mortgage? A. Yes, I had a copy of it in my possession.

Q. You had a copy of it furnished to you? A. Yes.

Q. Then who remained in possession till the sale? A. This Mr. Whan asked one of the employees to take charge.

I am not sure that we are told on what day Mr. Whan took possession, but we have his advertisement dated 8th May, for a sale on the 17th. The action was begun on the 15th of May.

This being so, we need not perplex ourselves by speculations as to the precise mode in which the court should interfere in a case where goods covered by a mortgage which comes within chapter 118 pass into, and remain in, the possession of an assignee of the equity of redemption, whether an assignee for the benefit of creditors or a purchaser of the equity. If the goods remain in the mortgagor's possession, the course will obviously be to seize them under the execution against him. But that position does not advance us in the inquiry, because the seizure would be, not of what he had fraudulently transferred, but of what he had retained, and the right to sell the whole estate, legal and equitable, in the goods would be perfect—the legal estate, because the mortgage was bad against creditors, and the mortgagor's estate for the same reason, he being disabled from asserting against a creditor the existence of the mortgage, as well as by virtue of the statute which makes an equity of redemption in goods and chattels saleable under *f. fa.* But where the equity had been transferred, and the

creditor's remedy was therefore only against the estate that passed by the mortgage out of the mortgagor, why should the enforcement of the remedy be a matter beyond the power of the court, or involve more difficulty than the realization of the interest of a debtor in any chattel of which he is only part owner ?

But, as I have said, the facts of this case make it unnecessary to pursue the inquiry further at present. Each case as it arises must be dealt with on its own facts.

I may repeat that the right of the creditor to realise by some process, and for our present purpose it does not matter what process may be appropriate, whatever interest is conveyed by a preferential mortgage, to the extent to which it is required for the satisfaction of his debt, seems to me to follow from holding, as we are bound to hold, that a mortgage is a conveyance or transfer within the meaning of chapter 118. Every argument to the contrary is to my mind an argument against the application of the statute to mortgages, and that cannot be listened to.

For these reasons I am satisfied that we ought to affirm the judgment of the court below so far as it is expressed in the second paragraph of the formal entry which reads thus :

" 2. This Court doth declare that the chattel mortgage made by the defendant Cox in favor of the defendants D. McCall & Co., and bearing date the 22nd day of March, A. D. 1884, was and is fraudulent and void as against the plaintiffs and such other of the creditors of the defendant Cox as may contribute to the expenses of this suit, and doth order and adjudge the same accordingly."

This is, as I have before remarked, the extent of the relief asked in the statement of complaint, and it is the extent to which we have any aid from the opinion expressed by the learned judge.

I have shewn why in my judgment the fund ought not to be handed over to the defendant Ferguson, who is a stranger in title to it and is not an officer of the court, notwithstanding that the plaintiffs may desire to have it so handed over, and that the defendants may not object to

that disposition of it if they are not allowed to keep it under their mortgage.

The question remains, what order ought to be made?

I do not see my way to make any further order than that contained in the second paragraph of the judgment.

It is to the effect indicated in the reports of *Reese River Mining Co. v. Atwell*, L. R. 7 Eq. 352, and in *Longeway v. Mitchell*, 17 Gr. 194, and I have not seen any authority to satisfy me that we should go further, while the tenor of what authority I have seen seems to me to be in the opposite direction.

What I understand to be urged is that the money in court should be distributed amongst all the creditors of Cox in the same way as in an administration suit.

The proposal is no doubt attractive from its apparent consonance with the familiar principle that "equality is equity," and if I could satisfy myself that we could adopt it without an extension of jurisdiction that savoured of legislation, I should not hesitate to adopt it.

When the action was commenced the defendants McCall & Co. were in possession of the goods lawfully as against all the world but the creditors of Cox. The creditors, who were not then entitled to seize the goods, and who had no lien upon them, asked for an injunction to prevent their sale to innocent purchasers. They did not ask and could not then have obtained from the court any more extensive relief. To entitle them to the relief they did ask, having regard to the fact that their debts were not due, they were carrying the doctrine of *Longeway v. Mitchell* possibly a step beyond the direct force, though I do not say farther than was warranted by the principle, of that decision.

In *Reese River Mining Co. v. Atwell*, Lord Romilly, dealing with the objection that no lien had been acquired, said: "I have little doubt that what was passing in Mr. Jessel's mind was the rule that the court will not give equitable execution until the creditor has put himself in a position to obtain execution at law, in which case there is no question of the statute at all. But as soon as the court finds that a deed has been executed for the pur-

pose of delaying, hindering or defrauding creditors, and that it comes within the statute, it sets the deed aside, but it goes no farther; and the plaintiffs must take some independent proceedings if they wish to have execution against the property in this deed." And Strong, V. C., referring to the argument used in the *Reese River Co.'s Case*, that a plaintiff was not entitled to a decree where he was in a position only to obtain a declaration which might be barren, made these remarks, 17 Gr. p. 190, "But Lord Romilly, drawing the line between merely setting aside the deed as fraudulent against creditors and the consequential relief of equitable execution, decreed the former but refused the latter relief, thus determining that whilst any creditor is entitled to have a deed which an Act of Parliament has enacted shall be deemed fraudulent as against all creditors, without distinction of priority, set aside, no creditor is entitled to resort to a court of equity to have execution for his debt, unless he has first perfected his title at law; a distinction which is very obvious and one which certainly commends itself to common sense."

These remarks certainly do not lose force from the circumstance, which would seem to have escaped the attention of the learned Vice-Chancellor, that in the case before Lord Romilly there was no question of legal execution, the plaintiffs having a judgment of the Court of Chancery, and the objection being to the absence of a charging order.

In *Bank of Upper Canada v. Thomas*, 9 Gr. 321, 2 E. & A. 502, the plaintiffs had executions against the lands of their debtor, who had made a deed which was impeached under the statute 13 Eliz. ch. 5. The deed was declared fraudulent by VanKoughnet, C., and the decree directed the usual reference as to incumbrances, account of amounts due, and sale in default of payment within one month after report, being in this respect, if I understand it correctly, the same decree which, about the same time, was said by Spragge, V.C., in *Mallock v. Plunkett*, 9 Gr. 556, to be the proper decree for a plaintiff to obtain in place of selling at law with an evident cloud upon the title and purchasing at an undervalue.

Instances of sales under execution, followed by actions

of ejectment upon the sheriff's deed in which the validity of the obstructing conveyance was the subject of the contest, will readily occur to those whose recollection of our courts goes back for thirty years or more, and will prove the value of the rule acted on in these cases of *The Bank of Upper Canada v. Thomas* and *Mallock v. Plunkett*; but when the court of equity, in such circumstances, undertook the sale it did not disturb the order of priority among the judgment creditors, nor did it ever assume, so far as I am aware, to treat the money produced by the sale of the land as standing on any other footing than the land itself.

The judgment of VanKoughnet, C., in the case of *The Bank v. Thomas*, was varied in appeal with respect to the right of the fraudulent grantee to enforce a judgment against the lands covered by the deed which was declared fraudulent, but his direction that the land should be sold by the court and not under the *fi. fa.* at law was affirmed. I shall read some observations which he made in the Court of Error and Appeal, as containing a statement of principles which I take to be indisputable, and not to have been disapproved of by the other members of the court from whom he differed as to their application to the circumstances of the case. I read from p. 513 of the report: "Equity in these cases gives no higher or other rights than the law does. Lord Hardwicke says in *Huggins v. The York Buildings Company*, (2 Atk. 107) "I do not know in the case of fraudulent conveyances, that this court have ever done anything more than remove such fraudulent conveyances out of the way * * * but equity follows the law, and leaves them to their remedy by *elegit*, without interfering one way or the other,' the rule being as I understand Lord Hardwicke, and as I understand the law of the court to be, that no person affected by, concerned or interested in removing out of the way of creditors a fraudulent conveyance, acquires thereby any higher or other right in this court than he held at law. This court may allow the parties to proceed upon their executions at law, as did Lord Hardwicke in the case cited; or according to the modern practice, it will itself

sell the property, or procure money to be raised on or out of it to pay off the creditors; but in so dealing with the estate it never has, in any instance that I am aware of, created or acknowledged any other rights than those which the parties might have enforced at law; or interfered with the order of those rights, unless it be to enforce some equitable claim which this court would itself have directed against the land had it remained in the hands of the fraudulent grantor."

This doctrine is to my mind entirely in accord with what is laid down in *Longeway v. Mitchell*; it is not opposed to any authority to which my attention has been directed, and it is needless to say that it is consistent with the application of the equitable principle of equal distribution to such assets as can only be reached by the hand of the court of equity or for access to which the creditor resorts to that court rather than to a court of law. Van-Koughnet, C., alludes to assets of these classes in the passage I have read, and we have examples of them in cases that have been in discussion in the present appeal, as *e. g. Huggins v. York Buildings Co.*, 2 Atk. 107; *Taylor v. Jones*, 2 Atk. 600; *Goldsmith v. Russell*, 5 D. M. & G. 547.

In obedience to the injunction, if one had been issued as prayed by the plaintiffs, the goods would have remained in the hands of the fraudulent grantee, liable to be taken by creditors in the order in which their executions came.

This might turn out an unprofitable or inconvenient condition of things in case the executions were delayed, as they would necessarily be in the case of these creditors whose debts were not due; and it might appear that the *Longeway v. Mitchell* doctrine, while very useful and workable in the case of lands, required to be supplemented when applied to perishable goods. That, I apprehend, would be a work of legislation, the existing right being to have the goods retained unsold, or sold only with notice.

Now when, in view of the inevitable loss which the retention of the goods would entail, it was arranged for the benefit of all concerned that the goods should be converted into money, I have been unable to see what ground we

have for holding that the rights, actual or potential, of the creditors became different with regard to the money from their rights with regard to the goods.

The arrangement that the money should be paid into court was nothing more than a provision for its safe keeping to answer whatever demands the goods would have been liable to at the instance of the creditors of Cox. The whole position in fact differs from that which every day arises in interpleader proceedings only from the fact that the creditors attacking the transfer are not judgment creditors.

The plaintiffs did not pray for a sale of the goods by the court, and it has not been contended that such a prayer would have been proper: but unless the court could properly have sold the goods, and could then have properly distributed the proceeds *pari passu* among the creditors as in the administration of the estate of a deceased debtor, or under the Insolvent Acts when they were in force, it is not easy to see how that jurisdiction arises from the accident of the court being made the custodian of this money.

This subject is one with which I do not profess so much practical familiarity as to enable me to express without some diffidence an opinion which I believe is not held by all the other members of the court. It is, however, the best opinion I can form from such means of information as I have.

When we declare the impeached transfer to be null and void as against the creditors of Cox, leaving the creditors to take some independent proceedings to make the goods, or the fund that now takes their place, available for payment of their debts, we do all that on this record as it stands the court is asked to do.

I am not prepared to lay it down, on the authority of this court, that the judgment of the court below ought to have gone further than that.

My conclusion therefore is, that we should vary the formal record of the judgment by striking out the third paragraph, leaving paragraph No. 2 to stand.

The fourth and fifth paragraphs deal with the costs. The disposition of costs has not been objected to. It differs from that in the two cases of *Reese River Mining Co. v. Atwell* and *Longeway v. Mitchell*, on which the right to maintain this action is supported, and in neither of which were costs given to the plaintiff; but I should not be disposed to quarrel with the award of costs in this case, the great contest having been upon the existence of the intent which avoids the deed. The right of the defendant Ferguson to be paid his costs by the defendants may be more questionable; but in his absence, and in the absence of complaint, we should, I think, let the fourth paragraph stand as to him as well as with regard to the plaintiffs.

But the fifth paragraph which assumes to dispose of part of the fund in court by making it liable to pay certain costs as between solicitor and client of the plaintiffs and of the defendant Ferguson, should, in accordance with the view I have expressed of that fund, be struck out.

These variations of the decree by striking out the third and fifth paragraphs are outside of the substantial question on which the appeal was brought, and on which the appellants fail. The appeal should therefore be dismissed with costs.

I would further add, that I have addressed my remarks to the question of the extent of the decree which ought to be made or directed by this court without intending to intimate, and without having attempted to form, a decided opinion as to how the court below ought to deal with the money. That will be for decision when some one applies to the court.

It will most likely be no more than just that the creditors should share ratably, and that principle is now intended to be carried out by the machinery of the Creditors' Relief Act, 1880, 43 Vict., ch. 10 (O). From what has appeared it is probable that all parties at present before the court are willing to have a ratable distribution, but that can be ascertained in the court below.

We do not know that all the creditors are before the court, nor do we know that those who are now plaintiffs would in the master's office maintain their position as creditors. See the concluding remarks of Lord Cottenham in *Owens v. Dickenson*, 1 Cr. & Ph. 48 at p. 56. And to direct a reference to the master would be to make the decree which I think is beyond our province to make.

But the substantial question being settled, and possibly no creditor having acquired a lien either on the goods or the money, even if a lien by execution had much value since the Act of 1880, it may perhaps be found that a disposition of the money satisfactory to all parties can be effected without allowing the exceptional exigences of this case to lead to the creation of a precedent which might hereafter prove embarrassing.

OSLER, J. A.—On the general merits of the case, I do not differ from my brother Ferguson and the other members of this Court.

The other grounds of appeal are substantially these. (1.) That the suit is improperly constituted, the principal defendants being excepted from the class, viz., the creditors of Cox, for whose benefit it is brought; and (2), that the conveyance of the equity of redemption to the assignee Ferguson, prevents the plaintiffs from obtaining execution against the property under any judgment they may hereafter obtain; and therefore, as they cannot be said to be hindered or delayed by means of the mortgage the Court will not interfere merely for the purpose of declaring it void, and cannot do indirectly at the instance of the creditors what could not be done directly at that of the assignee, for the purpose of enlarging the interest taken by him under the assignment.

To the first of these objections it is a sufficient answer that although their preferential security is declared void, the defendants are not excluded by the decree from sharing in the benefit of the suit in common with the other creditors of Cox. If there is any doubt as to this the

decree should be varied so as to make their right clear, in accordance with the decision of this court on that very point in the *Bank of Upper Canada v. Thomas*, 2 E. & A., 502.

The other objection is one which when incidentally discussed in former cases, particularly in *Parke v. St. George*, 10 A. R. 496, has appeared to me to be not free from difficulty both as regards the creditors' right to impeach the transaction in the circumstances, and the practical working out of the relief, if the right existed. All that was decided, however, in that case was that the doctrine of the *Reese River Mining Co., v. Atwell*, L. R. 7 Eq., 347, could not be extended so as to enable a person who was not a judgment or attaching creditor to set aside an instrument void against creditors only by reason of non-compliance with the requirements of the Chattel Mortgage Act; and that the purchaser or mortgagee under such an instrument might perfect his title by taking actual possession of the property before the issue of an execution or attachment.

Plainly stated the objection is, that though the mortgage was fraudulent against creditors, and liable, when it was made, to be set aside at their suit, or avoided by execution creditors, the fraudulent mortgagor can effectually shield it by means of a conveyance or assignment of the equity of redemption to a *bond fide* purchaser or to an assignee for the benefit of creditors (who is in the same position) before the recovery of judgment and execution. This, it is contended, is the necessary result of the conveyance of the equity, because the goods having become the property of the purchaser or assignee, subject to the mortgage, are not liable to be seized in execution in his hands: and as the assignee does not represent creditors but acquires merely the debtor's interest subject to all prior charges, which remain valid as against him, he is not a person who can avoid the fraudulent instrument on the creditors' behalf.

If this contention be sound there is no doubt that the

statute is practically defeated and a grave injustice inflicted on the creditors.

Some propositions in relation to a suit of this character, and the position of a voluntary assignee for the benefit of creditors are firmly settled. One of these is that it cannot be maintained by such an assignee for the reason already mentioned, namely, that he does not represent the creditors: *McMaster v. Clare*, 7 Gr. 550.

Another is that a creditor who has not recovered judgment may maintain a suit to have the fraudulent conveyance declared void and put out of the way of his anticipated execution. The extent and nature of the relief which should now be administered in such an action I shall refer to after wards.

A third proposition is that the statute, 13 Eliz. c. 5, and I may assume also our own statute, R. S. O. ch. 118, extends only to the transfer and assignment of such things as are liable to be taken in execution. In the language of Sir W. Page-Wood, V. C., in *Barrack v. McCulloch*, 3 K. & J. 110, 116, "An assignment of property which could not be taken in execution is not, within the words of the statute, an assignment of property with intent to delay creditors, inasmuch as creditors never could have had execution or satisfaction out of such property."

Therefore a gift of money, or settlement of a policy of insurance, or of stock, and an assignment of a mortgage when property of that description was not available for the satisfaction of creditors was held not to be within the statute: *Duffin v. Furness*, Ca. t. K. 77; *Dundass v. Dutens*, 1 Ves. Jr. 196; *Kidder v. Rider*, 10 Ves. 360; *Sims v. Thomas*, 12 A. & E. 536; *Lodor v. Creighton*, 9 C. P. 295.

It will be observed that in these cases and others of a similar character, the particular assignment attacked had never been obnoxious to the statute, because the property comprised in it had never been subject to be taken in execution. In that respect they differ widely from the present case, in which but for the supposed bar raised by the assignment, there can be no doubt that the fraudulent

mortgage would always have been set aside at the instance of an execution creditor, or would not have stood in the way of his enforcing his execution.

I shall therefore consider the case in the first place as if the plaintiffs were asking the aid of the court as judgment or execution creditors. If in that character they would not be entitled to effectual relief to the extent of avoiding the fraudulent conveyance and having execution of the interest which the mortgagor had thereby sought to abstract from his creditors, then *a fortiori* the present action must fail. If the effect of the assignment is what is contended for, nothing is to be gained by making a useless decree and merely setting the instrument aside: *Grogan v. Cooke*, 2 Ball & Be. 233, where it is said by Lord Manners that Lord Thurlow in *Dundass v. Dutens*, 1 Ves. Jr., had expressed himself thus: "It would be preposterous and absurd to set aside an assignment, which if set aside leaves the property in the hands of a person where you could not touch it."

Upon full consideration I have formed the opinion, contrary, I must admit, to that which I formerly entertained, that there are authorities which warrant us in deciding that the Court can lay hold of this property for creditors, notwithstanding the fact that the particular interest created by the fraudulent mortgage was not as such saleable under execution at law.

In *Jackson v. Bowman*, 14 Gr. 156, a person in insolvent circumstances conveyed to his intended wife by way of settlement a lot of land upon which he had commenced to build a house. After the marriage he completed the house. It was held that his assignees in insolvency were entitled to a charge on the property to the amount expended upon it by the insolvent after the marriage.

The judgment was given by the late Chief Justice of this court when Vice-Chancellor, and the principle on which he held the creditors entitled to relief is extremely pertinent to the case before us in the aspect in which I am now dealing with it. He said: "The difficulty is created

by their not being practically separable from that which is the property of the wife, and there being no fraud in the wife in allowing them to be added to her estate. * * If the thing settled upon the wife were not land but something of ordinary market value the difficulty would not exist. The question is whether the court could properly make this principle as to the character of the land give way in order to do justice to creditors of the husband. I have no hesitation in saying that if the court can do so, it ought to do so. The court has to deal in such cases with two conflicting principles, one of which must be made to give way to the other. The one is the right of the wife to * * her land; the other, the right of the creditors of the husband to have his voluntary settlement avoided for their benefit. To avoid such a settlement would be doing some violence to the abstract right of the wife in regard to her land, but on the other hand to deny the right of the creditors and to hold the wife's land inviolate would be to defeat the statute of Elizabeth, and to sacrifice the rights of creditors to a rule which is often, and in this country especially, a technical one. The expenditure in building after marriage upon the wife's land is a voluntary settlement upon her, and if made by a husband in insolvent circumstances is void as against creditors; the getting at it is the difficulty. The right to have it is with the creditors, and as I must deny their right or overcome the difficulty, I hold the difficulty should be overcome when these two things concur, when it is 'essential to the giving effect to the rights of the creditors, and when it can be done without practical injustice to the wife.' The decree gave the wife the option to have the value of the improvements declared a charge upon the land and a sale in default of payment, or to require the creditors to purchase her estate at its value independent of the improvements.

In *Davidson v. Maguire*, 27 Gr. 483, Proudfoot, V.C., doubted whether this decision had not gone too far, as the interest which the assignees were thus allowed to reach was not saleable under execution at law. It was, however, subsequently commented on and approved of in the same case when in this court, 7 A. R. p. 98, where the Chief Justice said: "It is the withdrawing from the reach of creditors that which is exigible at the suit of creditors that

is evidently pointed at by the statute. * * It ought to be immaterial, and I think is immaterial, whether that which is withdrawn from creditors is converted into something exigible at the suit of creditors or not. If converted into something not exigible, then the creditors may follow that which has been withdrawn from them into land or stock or whatever else has been purchased therewith."

In *French v. French*, 6 D. M. & G. 95, an insolvent trader had agreed to sell his business and stock in trade in consideration of a money payment and an annuity payable to his wife equal to one-quarter of the profits. After his death, in a creditor's administration suit, it was held that the annuity to the wife was void under the statute of Elizabeth, and that it was competent for the creditors to impeach the annuity without seeking to set aside the whole transaction. The decree declared that so much of the settlement as related to it was void as against creditors of the settlor, without prejudice to the vendee's claim on the estate if there should be a surplus after payment of creditors.

The Chancellor (Lord Cranworth) said: "The transaction is to be looked at as if the sale to Mr. Gibbons had been in consideration of so much of the purchase money to be paid down and of an annuity which was covenanted to be paid to the wife of the debtor. I consider that annuity so payable to the widow just in the same light as if it was taken and applied to his own purposes and abstracted from his creditors. It formed clearly a portion of the consideration which, instead of keeping for the benefit of his creditors, he chose to keep for the benefit of his wife. The law is clear that such a transaction is fraudulent against creditors, that is to say it is an attempt to abstract from creditors what they are entitled to look to for payment of their debts." See also *Goldsmith v. Russell*, 5 D. M. & G. 547, 554.

And in *Blenkinsopp v. Blenkinsopp*, 12 Beav. 568, 587, it is said, per Langdale, M. R.: "The Court in which the right is established (*i. e.*, the right to be paid a debt out of the defendant's real and personal estate) having no jurisdiction to remove the obstacle which the defendant's fraud has created, or to lay hold of the benefit which remains in the defendant, and it being within the jurisdiction and

duty of this court to extend its aid in such a case, I think the plaintiff is entitled to some relief."

In the *Bank of Upper Canada v. Thomas*, 2 E. & A. 502, 514, VanKoughnet, C., said: "This Court may allow the parties to proceed upon their executions at law as did Lord Hardwicke in *Huggins v. York Buildings Co.*, 2 Atk., 107 or according to the modern practice it will itself sell the property, or procure money to be raised on or out of it, to pay off the creditors."

If the Court has been able in these cases to declare the fraudulent conveyance void as against creditors, and to lay hold upon the debtor's interest for the assignees in insolvency, or in a creditor's administration suit, it necessarily follows that it can and will on the same principle assist an execution creditor by giving him equitable execution of the debtor's interest in a case like the present, where that can be done without injustice to the purchaser or assignee. As against creditors the mortgage is declared void. The result of that cannot be to enlarge the estate of the subsequent purchaser so that he takes the property free from the mortgage, for the debtor conveyed him nothing but his equity of redemption.

The charge created by the mortgage represented so much of the purchase money or value of the goods, and being assumed by the purchaser, is the measure of the interest which the debtor has withdrawn from his creditors for his own benefit, or to prefer some particular creditor, which is the same thing. The fraudulent conveyance being void as against the former, this interest still belongs to and is in the debtor for the purpose of satisfying them. The only question is how it is to be got at.

The difficulty to be surmounted here is infinitely less (the property consisting merely of personal chattels) than it was in some of the cases I have referred to. I see no practical difference between a case like this, where the debtor has first created a fraudulent charge or mortgage in favor of a creditor by one instrument and has then by another conveyed his equity of redemption subject to such charge, and a case where, as in *French v. French*, he has

by a single instrument conveyed all his property, charging it with an annuity in favor of his wife or other person, except that the difficulty of dealing with the debtor's interest, with due regard to that of the purchaser, may be greater in the latter case when he happens to be something more than a mere voluntary assignee.

The power of the court to reach the debtor's interest cannot depend upon the shape he makes it assume. It ought to be, and I think it is, as effectual under any of the conditions I have alluded to as it would be if the debtor had taken a mortgage for the purchase money or a part of it, and had then fraudulently assigned or discharged it, or as if the interest he had thus dealt with had been merely his right to or interest in the purchase money. I am of opinion that in all such cases the court, if the terms of the purchaser's bargain (where it is *bona fide*) can be respected, or where it can be done without injustice to him, can effectually give execution through the medium of the largely increased powers of doing so which now exist by means of a receiver, or of a writ of sequestration, or by a sale of the property fastening on the interest which the debtor has attempted to part with, or by treating the fraudulent grantee or mortgagee as a trustee and directing him to concur in all acts necessary to make the property available for creditors: *May* on Fraudulent Conveyances, pp. 427, 470; *Brown v. Perrott*, 4 Beav. 505; *Anglo Italian Bank v. Davies*, 9 Ch. D. 277, 293; *London Loan Co. v. Merritt*, 32 C. P. 375, 383; *Blenkinsopp v. Blenkinsopp*, 12 Beav. 568, 557; *Bott v. Smith*, 21 Beav. 511; *The Bank of Upper Canada v. Shickluna*, 10 Gr. 157.

From the conclusion thus arrived at as to the creditors' right to obtain execution of property of this nature it follows, upon the authority of the *Reese River Mining Co. v. Atwell*, L. R. 7 Eq. 347, and *Longeway v. Mitchell*, 17 Gr. 190, that the plaintiffs having proved their status as creditors are at least entitled to a decree declaring the impeached conveyance to be void as against creditors. But should not the court now go further? In those cases the court of equity was exercising its own peculiar jurisdiction to set aside an

instrument on the ground of fraud, and could not give the plaintiff judgment and execution. To arm himself with that he was compelled to resort to a court of law, though a legal execution might be useless, and it might be necessary for him if he wanted equitable execution again to resort to the Court of Chancery by means of a fresh suit in that court.

Under the jurisdiction at first conferred on the old courts by the Administration of Justice Act, and now, in consequence of the creation by the Judicature Act of a new tribunal, having the combined jurisdictions of the old, this state of things no longer exists, and the court gives in one and the same action, so far as it can conveniently be done, the complete and appropriate relief to which the party is entitled. O. J. Act, sec. 16, sub-sec. 8.

In such an action as the present that relief is (1) a declaration that the fraudulent conveyance is void as against creditors, and (2) judgment for the debt and execution against the debtor's interest in the property.

On principle, and on the authority of such cases as *Anglo-Italian Bank v. Davies*, 9 Ch. D. 277; *Smith v. Cowell*, 6 Q. B. D. 75; *Salt v. Cooper*, 16 Ch. D. 544; *Slade v. Hulme*, 18 Ch. D. 653, I can see no reason why all this should not be done in the same action.

All the members of the Court, however, do not take this view, and as the only relief the plaintiffs have asked in their pleadings is that the conveyance may be declared void, and this is the substantial relief granted by the decree it is perhaps as far as the Court on the pleadings is at liberty to go. But the decree must, if the defendants desire it, be varied by striking out that part of it which directs the money in court to be paid out to the assignee and distributed by him under the trusts of the deed of assignment.

Considering that the assignee has no rights in regard to the fund, that is a direction which could only be made by consent and as matter of convenience to all parties.

Appeal dismissed with costs—Burton, J. A., dissenting.

BLEAKLEY V. THE CORPORATION OF PRESCOTT.

Municipal corporation—Icy formation on sidewalk—Negligence.

The plaintiff, a resident inhabitant of the town of Prescott, whilst proceeding along one of the sidewalks of the town attempted to cross from one side of such walk to the other over an accumulation of hard beaten snow, where there was a slight declivity in the sidewalk, and in doing so slipped and fell thereby injuring herself :

Held, [reversing the judgment of the Q. B. D. 7 O. R. 261,] that there was no proof of such accumulation of snow as indicated negligence on the part of the defendants, and there being no evidence of negligence in the construction of the side walk the corporation was not liable.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 7 O. R. 261, where the facts are fully and clearly stated, and came on to be heard before this court, on the 13th of November, 1885*

G. H. Watson, for the appellants.

D. B. Read, Q. C., and *W. Read*, for respondent.

January 12th, 1886. The judgment of the court was delivered by

HAGARTY, C. J. O.—The accident to plaintiff seems to have happened thus : In the broad day light of a winter's day she was walking on the side path, there was not perhaps over an inch of snow on the level, and in the middle of the path a ridge of caked snow or ice. She thought she would step over this ridge to the inner side, and in doing so she slipped or stumbled and was injured.

There was evidence of there being a slope or incline on the sidewalk at or just at that point, though it is not clear whether on the exact spot where she slipped the incline had begun. It was not a steep incline ; not at the most over an inch to the foot. The weather was very cold and there was what they call a "glare" on the sidewalks. The plaintiff was perfectly well aware of the state of the sidewalks from the time she left her house and had gone out for a walk with ordinary leather soles to her boots.

* *Present*.—HAGARTY, C. J. O., BRETHERTON, OLIVER, J. J. A. and GALT, J.

HATELY V. THE MERCHANTS' DESPATCH COMPANY ET AL.

*Security for costs—Delivery out of bond—Appeal—Interlocutory order—
O. J. A. secs. 34, 35—Amount—Discretion.*

Held [reversing the order of the Queen's Bench Divisional Court, 11 P. R. 9] that the plaintiff was not entitled to have delivered out to him, for cancellation, a bond for security for costs of the action after judgment in his favor by the Queen's Bench Divisional Court, before the time for appealing to this court had elapsed, and while an appeal was actually pending.

The order of the court below, even if interlocutory, was appealable under the language of the Court of Appeal Act, and as the penalty of the bond was \$1,000, and the defendants' costs exceeded that amount, the sum in controversy was sufficient to warrant an appeal, and it could not be said that it was a matter so entirely in the discretion of the Court below that this court would not interfere.

The right of appeal conferred by the Judicature Act considered.

Quære, per BURTON and PATTERSON, JJ.A., whether the order in appeal was interlocutory.

Quære, per OSLER, J.A., and GALT, J., whether sections 33 & 34 O. J. Act, apply to appeals from interlocutory orders.

This was an appeal by the defendants, the Merchants' Despatch Co. and the Great Western Steamship Co. (Limited), from an order of the Divisional Court of the Queen's Bench Division (11 P. R. 9), made under the following circumstances.

The action was brought against the two appellant companies together with the Great Western Railway Company or the Grand Trunk Railway Company into which it was merged.

After some proceedings in the action the plaintiff removed his residence from this Province to the United States, and thereupon the defendants obtained from the registrar of the Queen's Bench Division (sitting for the Master in Chambers) an order for security for costs in the penal sum of \$1,900, which was reduced to \$1,000 on appeal to a Judge in Chambers. The registrar's order was made on 29th March, 1883, and the order of the Judge in Chambers on 7th June, 1883.

A bond was given for \$1,000, and it was stated to be "in the usual form," but no further particulars of its contents were mentioned.

At the trial of the action judgment was given against all the defendants.

All the defendants appealed against the judgment, but not all to the same court. The steamship company and the railway company moved in the Divisional Court of the Queen's Bench Division, while the Merchants' Despatch Company came at once to this court.

In the Divisional Court judgment was pronounced on 16th February, 1884, dismissing, with costs, the application of the steamship company, and dismissing the action against the railway company, without costs.

And then on 8th March, 1884, the Divisional Court made the order now in appeal. The motion for the order was made to the registrar and by him referred to the Court.

The order drawn up was in these words :

" Upon the application of the plaintiffs, and upon reading the orders for security for costs in this action made by the registrar of the Queen's Bench Division, sitting in chambers for the Master in Chambers, and on the appeal therefrom by the Hon. Mr. Justice Osler in Chambers, and the bond for security for costs given by the plaintiff, Walter C. Hately, pursuant to the said orders, and filed in the office of the registrar of the Queen's Bench Division of the High Court of Justice, at Toronto, on the 7th day of June last, and the order of this court made herein on the 16th day of February, 1884, and upon hearing all parties above named by their counsel :

It is ordered that the said orders for security for costs made in chambers as aforesaid be, and the same are hereby, except as to their provisions as to the costs of such applications, set aside and vacated and discharged, and that the said bond for security for costs be forthwith delivered out of court to the plaintiffs to be cancelled, and the sureties therein named relieved and discharged from all liability to the defendants or either of them thereunder.

Costs of this application, as of an application to a Judge in Chambers for the like order, to be costs to plaintiff in the cause."

The defendants the Merchants' Despatch Company and the Great Western Steamship Company thereupon appealed

from such order, and the appeal came on to be heard before this court on the 10th November, 1885.*

McCarthy, Q. C., and *W. Nesbitt*, for the appellants.
Aylesworth, for the respondents.

The arguments and authorities appear in the judgments.

January 26, 1886. BURTON, J. A.—In this case an order for security for costs was obtained by the defendants from the registrar in consequence of the removal of the plaintiff out of the jurisdiction of the courts of this Province, which order, with some variations, was confirmed by a judge, and this latter order was not appealed against.

Security was given in pursuance of this order by bond. No copy is given in the appeal book, but it is stated to be "in the usual form."

I am not sure what is now the usual form, but my impression is that until the changes effected in procedure by recent legislation the condition of the bond was confined to cases in which the plaintiff was non-suited, discontinued, or a verdict was rendered for the defendant, and I may assume for the purposes of this case that that was the language, although the form given in the present books of practice provides for many other contingencies.

It would have struck one as somewhat startling, if under a bond so worded, a court had ordered the security to be given up or cancelled immediately after a verdict for the plaintiff, although objections were urged at the trial against it which might ultimately prevail *in banc*; and yet that is in principle precisely what has been done in this case, inasmuch as the verdict, confirmed as it was by the Divisional Court, was still subject to appeal, and the law provides that an appeal shall be a step in the cause.

A verdict was rendered in this action by a judge without a jury against all three of the defendants, which, as to

* *Present*—BURTON, PATTERSON, OSLER, JJ.A., and GALT, J.

one of them, was set aside by the Divisional Court, and confirmed as to the defendants the Great Western Steamship Company, who are now appealing against the order.

The judgment of the Divisional Court was given upon the 16th February, 1884, and on the 8th March, upon no other material than the orders to which I have referred, the bond itself and the order made by the court on the 16th February confirming the verdict, the order complained of, was made, setting aside those orders except as to their provisions as to costs, and directing the bond to be delivered out of court to the plaintiff to be cancelled.

I find that it has been expressly held in England that when a plaintiff has been compelled to give security for costs in consequence of his being resident abroad, the court will not order the bond to be cancelled on an affidavit that he has returned to England and is resident there: *Badnall v. Haylay*, 4 M. & W. 535, 7 Dowl. 19.

Parke, B., in that case said he knew of no precedent for such an application, and Alderson, B., that the terms having been once imposed surely those terms must last while the suit goes on.

Here the order was properly made, and was not appealed against, and in a recent case in England the court refused to interfere to rescind the order on an affidavit that the plaintiffs had returned to England, and intended to remain there, and I find no English case where such an application was granted after the security had been given.

Here nothing of the kind is pretended, but an order has been made not only directing the bond to be cancelled but the orders themselves to be rescinded, although the time for appealing against the last of them had long since passed, merely because there was provisionally a verdict the other way.

If such an order can be upheld, the granting security for costs is altogether illusory, as although the defendant may all the time have been correct in his contention and have never been under any legal liability to the plaintiff, and may ultimately obtain a decision in his favor, he is

deprived of the security for the costs which he has wrongfully sustained, and which a competent tribunal has given to him, because some intermediate court has once decided against him, and upon the strength of their own decision has at the same time deprived him of that security which one tribunal has awarded to him and which the ultimate decision shews he was entitled to.

There is no reason why such an order should be made. If the affirmance by the Queen's Bench Division of the verdict was correct, no harm was done to any one by allowing the bond to remain upon the files of the court. If, on the contrary, that judgment should happen to be reversed, as is the case here, an irreparable injury might occur to the defendant in depriving him of his costs, for which security was awarded to him.

I am, therefore, of opinion that the decision appealed from was wrong and ought to be reversed unless some of the preliminary objections are entitled to prevail.

The first of these is that this is an interlocutory order and not appealable before the Judicature Act.

I am by no means clear that this is an interlocutory order. It makes a final disposition of the matter in controversy, and as effectually and finally disposes of the defendants' rights as if it were the final judgment in an action. In what sense can it be called interlocutory? I do not say that there may not be orders which are of that character even after final judgment in the principal action, but I find it very difficult to attribute it to this order. But whether it be so or not does not appear to me to be material, inasmuch as it would as an interlocutory order be appealable if such an order would have been appealable before the Judicature Act.

I think there can be no doubt, unless we are to set ourselves above the legislature and disregard the enactment, that this order was appealable under the language of the Court of Appeal Act.

I do not pretend to offer an opinion as to whether it is desirable that such a right of appeal should or should not

exist; but I find the words of that act extend the right of appeal against any judgment, decree, rule, order, or decision of the court. How can it be successfully contended under this language that this order is not appealable? I shall so hold until the legislature puts a more limited construction upon its language or I am compelled to do so by a Superior Court.

Another objection was that as the court below were unanimous, and the matter in controversy was not shewn to exceed the sum or value of \$500, no appeal would lie. My brother Patterson in the judgment he is about to deliver has so fully dealt with that point that I merely desire to say that I fully agree with him and with the reasoning of that eminent and painstaking judge, the late Sir James Macaulay, in the cases to which he refers, in holding that the penalty of the bond, which is \$1,000, was the matter in controversy and what these defendants were deprived of by the order in question; and I suppose we may refer to the evidence which appears upon the appeal books in connection with the original application, which seems to shew that the defendants' costs exceeded that amount.

Lastly it was urged that it was a matter of discretion, which should not be interfered with. I do not look at it in that light. The defendants were at the time of the decision absolutely entitled to the bond in question as a matter of right, and were entitled to sue upon it whenever any of the contingencies arose which gave them a right of action. I have found no authority, and am satisfied no authority can be found for making the order in question under the circumstances which arose in this case. But even were it matter of discretion the result shews that it was not properly exercised. A loose and unfettered discretion in thus dealing with people's rights would be a very dangerous power to entrust to any court. The discretion should be one regulated by well defined rules and principles, so that the decision could be looked upon as a precedent for future guidance.

It is a word which as applied to judicial proceedings I look upon with much disfavor, and am satisfied that the more sparingly it is used the better.

For these reasons I am of opinion that the appeal should be allowed, with costs, and the order vacating the bond set aside.

PATTERSON, J. A.—[After stating the facts as above set forth.]—I have read the order appealed from in full, merely for the sake of the statement it contains of the materials on which it was made, and because of a suggestion made by Mr. Aylesworth in his argument against the appeal, that it was consistent with all that appeared that the plaintiff may have returned to the province, and that the order may have been made on that ground. It is plain from the frame of the order that it was not made on that ground, but because the court held that the plaintiff was entitled to have the bond given up in consequence of the judgment in his favor, under which he was not liable to pay costs to any of the defendants.

I have not met with any case in which, in a common law court, a bond for security for costs has been ordered to be given up by reason of the return of the plaintiff to the jurisdiction. In *Badnall v. Haylay*, 4 M. & W. 535, 7 Dowl. 19, an application of the kind was refused, Parke, B., stating that there was no precedent for such a rule.

When a plaintiff has returned after the order for security, but before bond given, there are cases in which the order has been rescinded, and others in which the court has refused to rescind the order. In *Place v. Campbell*, 6 D. & L. 113, the order was rescinded, and so in some cases in our own courts, *e. g.*, *Watson v. Yorston*, 1 U. C. L. J. N. S. 97, where the rescission was on terms, and *Harvey v. Smith*, 1 Ch. Chamb. R. 392, where no terms were imposed. In an Irish case, *Sterne v. Goodisson*, 7 Ir. Eq. R. 89, the order was rescinded, and the recognizance which had been entered into as security for costs was vacated. The latest case on the point which I have seen is *Westen-*

berg v. Mortimore, L. R. 10 C. P. 438. The court there refused to rescind the order. It is possible that there may have been reasons to doubt the *bona fides* of the plaintiff's return, as there were in *Marsh v. Beard*, 1 Ch. Chamb. R. 390, but the decision is scarcely put on that ground. Brett, J., in his judgment said (p. 441): "Such an application might be made even after security given. I doubt whether, even if satisfied of the *bona fides* of the application, the court could rescind the order. Possibly the obligation might be got rid of upon terms."

But the suggestion, which was, of course, merely put as something that might be intended in support of the order if the ground on which the order was made did not appear, is displaced by the recital in the order itself, quite independently of the difficulty put in its way by the precedents.

The "usual form" of bond I understand to be that given in *Chitty's Forms*, the condition, shortly stated, being to pay the costs taxed in the action, which the plaintiff by any judgment against him in the action shall be ordered to pay.

The judgment now in appeal I understand to proceed upon the view that the condition relates only to the judgment as given in the court of first instance, and that that being in the plaintiff's favor, the condition is fulfilled, notwithstanding that that judgment may be reversed in appeal and the costs of the action ultimately given against the plaintiff.

In my opinion that reading of the words of the condition, "If the defendant obtain a judgment or verdict or any other judgment therein," introduces a limitation which the language does not properly admit, and which would go far to destroy the value of the security. If the plaintiff's assertion of the right to have the bond given up is valid after the judgment of the Divisional Court, it would be equally so after the judgment ordered at the trial, and it is so treated in this judgment, as far as the Merchants' Despatch Company are concerned, for there was no judgment of the Divisional Court against that company. Then

if upon succeeding at the trial the plaintiff is entitled to have his bond cancelled, and asserts that right, we have this anomaly: the defendant who may, either in the Divisional Court or in the Court of Appeal, ultimately succeed, possibly by giving further evidence which may have been rejected at the trial and received by the appellate court, as in *Boswell v. Coaks*, 27 Ch. D. 424, obtains judgment in the action, the very event for which in terms the bond provides, and yet is deprived of his security.

The appellants make a point of the alleged fact that an appeal to this court was instituted before the order was made. I do not think the fact so appears, but in my view it is not a material fact.

It is, of course, within our knowledge that there was an appeal which reached this court, and that we left the judgment against the Merchants' Despatch Company undisturbed, but ordered the action against the steamship company to be dismissed, with costs.

Whether the case may be carried further by either plaintiff or defendants we do not know. So far we are aware that a judgment stands against the plaintiff in favor of one defendant company; and, as long as a further appeal is open, we cannot say what the ultimate event may be. I do not see any point short of the final disposition of the action, at which the liability on the bond ceases. Nor do I see any reason for holding that the "costs taxed in the action," are confined to the costs up to the first pronouncing of judgment, or to the costs of the court of first instance. It is true that in coming to this court or going to the Supreme Court, security for the costs of the appeal to a fixed amount has to be given; but that has to be done by all appellants whether living here or in a foreign country. The sureties on those appeals are only liable to the amount of their undertaking, notwithstanding that the costs may exceed that amount, but the appellant is always personally liable for the whole.

In *Bougleux v. Swayne*, 3 E. & B. 829, security for costs had been given, but the costs taxed in the Queen's Bench

exceeded the amount of the bond, and the Court of Exchequer Chamber ordered security to be given for an increased amount. I think that case shews that the original sureties would have been liable for the costs in the Exchequer Chamber if their obligation had not been exhausted by the costs of the court below; and that inference is certainly not weakened by the circumstance, stated by Jervis, C. J., that there was no precedent for the order there made for giving additional security.

I have purposely deferred till the last my notice of the preliminary objections to our jurisdiction to hear this appeal.

Objections are made under sections 34 and 35 of the Judicature Act.

Under sec. 34 there could be no appeal in this matter "unless the matter in controversy on the appeal exceeds the sum or value of \$500, exclusive of costs."

The defendants assert that they ought to have been allowed to retain the bond. The plaintiff denies the asserted right. That is the controversy. By the effect of the order the plaintiff's position is sustained and the bond cancelled. The result, and the act of cancellation itself, are much the same as those which occasioned the suit of *Bank of Upper Canada v. Widmer*, 2 O. S. 222, a bond there having been given up without legal authority from the obligees, and cancelled by the obligors. In trover for the bond the plaintiffs were held entitled to recover damages to the amount of the penalty. The judgments in the case are very long, but the facts necessary to note will be found succinctly stated by Macaulay, J., at p. 281. The condition in that case had not been broken, and it was assumed that, on evidence of the contents of the bond, an action upon the bond could have been sustained notwithstanding its cancellation.

Under that authority I think we may properly hold that the value of the matter in controversy on this appeal is \$1,000.

The objection under section 35 is that this is an inter-

locutory order, and would not have been appealable before the Judicature Act.

Counsel for the appellants did not dispute the interlocutory character attributed to the order, and it may for the purpose of the objection be treated as interlocutory; but I do not commit myself to the opinion that it is properly so called, while I do not give any definite opinion to the contrary. The order is decisive of the right to the bond, and that consideration suggests the same remarks which I lately made in *Whiting v. Hovey*, *ante* p. 119, as to the necessity for considering what is the proper signification of the word "interlocutory" as used in section 35, whether as denoting any step intermediate between the initiatory process and the final judgment, or as not including any order which is a final decision on a matter of right at whatever stage of the action such order may happen to be made.

But there is more than that in the present case to lead me to be cautious before classing these proceedings for security for costs among interlocutory proceedings.

I should certainly have said without hesitation that such proceedings were interlocutory if the order for security had been the order with which alone I am familiar, by which the plaintiff's proceedings are stayed until he gives security. That used to be the tenor of the order, as I apprehend, even when a plaintiff left the country during the progress of his action, as in *Harvey v. Jacob*, 1 B. & Ald. 159; *Weeks v. Cole*, 14 Ves. 518, and similar cases. The order in *LaGrange v. McAndrew*, 4 Q. B. D. 210, was of that character, and the dismissal of that action for want of prosecution marks a departure from the rule of the common law courts which prevented a defendant from having judgment of *non pros.* for delay on the plaintiff's part while the stay lasted, and the adoption of the equity practice, a number of instances of which I find noted in *Chitty's Equity Index*.

The order in this case was not that proceedings be stayed till security given, but that on default in giving

the security within a stated time the action be dismissed. I do not say that displaces the proceeding from the category of interlocutory proceedings, but as the practice of making orders in that shape is new to me I prefer to reserve my opinion about it.

The matter becomes unimportant in view of the provisions of the Court of Appeal Act, R. S. O. ch. 38, sec. 18, which gave an appeal from every judgment of any of the Superior Courts, defining "judgment" by sec. 2 as including any judgment, decree, rule, order, or decision of the court.

Under this it is, I think, clear that before the Judicature Act an appeal would have lain from the order in question, even though an interlocutory order, and that therefore sec. 35 of the Judicature Act cannot help the respondent.

I think the appeal should be allowed, with costs.

OSLER, J. A.—This is an appeal by the defendants the Merchants' Despatch Company and the Great Western Steamship Company, from an order of the Queen's Bench Division of the High Court, rescinding an order for security for costs, and directing the bond for security which had been given by the plaintiff to the defendants in pursuance of such order to be delivered up to be cancelled.

The facts appear to be, that at the trial judgment was directed to be entered in favor of the plaintiff against all three defendants. The defendants the Merchants' Despatch Company appealed from that judgment to the Court of Appeal, while the Great Western Steamship Company and the Great Western Railway Company moved against it in the Divisional Court. The steamship company's motion was unsuccessful and as against the railway company the action was dismissed without costs. Thereupon the plaintiff, who thus had judgment against two of the defendants and who had not been ordered to pay costs to the third, moved before a Judge for an order to rescind the order which had been made in an early stage of the

action for security for costs and for the delivery up of the bond given thereunder. The motion was adjourned before the full court, who made the order now complained of. The steamship company had in the meantime given notice of appeal from the decision of the Queen's Bench Division. Their appeal has recently been heard and allowed, with costs, and the action against them dismissed, with costs. The appeal of the Merchants' Despatch Company has been dismissed. Under these circumstances the steamship company contend that the court below ought not to have rescinded the order and delivered up the bond for security for costs before the time for taking proceedings in appeal had elapsed.

I think we must hold that the order of the Queen's Bench Division is an appealable order.

Section 13 of the Judicature Act enacts that the Court of Appeal shall continue to have all the jurisdiction and power which it has heretofore had, save as varied by the Act, and in civil cases shall, subject to certain exceptions, also have jurisdiction, to hear appeals from any judgment or order of the High Court or of any Judge or Judges thereof. The latter clause corresponds with sec. 19 of the English Judicature Act, and in *Regina v. The Overseers of Walsall*, 3 Q. B. D. 457, Cotton, L. J., speaking of the jurisdiction of the Court of Appeal in England under that section, said (p. 460): "It is authorised to hear appeals from every division of the High Court * * and it can hear appeals from interlocutory orders made on matters of mere practice." And per Bramwell, L. J. (p. 463): "The Judicature Act intended, as a rule of all but universal application, that there should be an appeal from the High Court to the Court of Appeal in every case where the High Court has given a judgment, order, or decision." In accordance with this was the decision of the House of Lords when the case afterwards came before that tribunal in 4 App. Cas. 30, Lord Cairns saying (p. 38): "I do not think it is open to doubt that these clear and definite words of the Legislature must have their full effect given to them. Your Lordships have here, on the one hand, a rule of the Queen's Bench Division [which he points out includes, as with us by force of the interpre-

tation clause, an order], and you have, on the other hand, an enactment that every rule of the Queen's Bench Division is to be open to appeal. That being so, unless there is something more which has not yet been brought forward, those clear words must have effect given to them, and it lies upon those who wish to cut down their effect, to shew how that is to be done." And in *Ormerod v. The Todmorden Mill Co.*, 8 Q. B. D. 664, 676, Brett, L. J., said: "It has been laid down in this Court, in several cases, that according to the Judicature Act there is an appeal to this court from every order of a learned judge, or of the Divisional Court, unless such appeal is expressly or by necessary implication taken away by the Judicature Act or by some other statute which is unrepealed." See also *Corporation of Peterboro' v. Wilsthorpe*, 12 Q. B. D. 1; *Harmon v. Park*, 29 W. R. 750. The observation of Lord Cairns forcibly applies to the attempt of the plaintiff to bring the case within some of the limitations of the right of appeal which are found in the 32nd and following sections of our act; and also to the way in which the provisions of the Court of Appeal Act, which I shall hereafter refer to, should be dealt with.

The order in question not being a consent order or an order made in chambers or on an appeal from chambers, sections 32 and 36 are inapplicable. It is admittedly, though final in its nature, an interlocutory order, (see *Smith v. Cowell*, 6 Q. B. D. 75,) made in court, and the 35th section relates specially to orders of that description. I am not satisfied that sections 33 and 34, which limit appeals except upon certain conditions where the amount involved does not exceed \$200 or \$500, apply to such orders at all, but they do not at all events apply here, the matter in controversy being a bond or security of the nominal value of \$1,000.

Then the 35th section provides that there shall be no appeal to the Court of Appeal from an interlocutory order, in case before the passing of this act there would have been no relief from a like order by an appeal to the Court of Appeal.

This throws us back upon the Court of Appeal Act,

R. S. O. ch. 38, and we have to see whether an appeal lay from such an order as this under that Act. The interpretation clause, section 2, declares that unless it is otherwise provided or unless the context manifestly requires a different construction, the word "judgment" when used with reference to a court appealed from or to any judge of such court "shall include any judgment, decree, rule, *order*, or decision of such court or judge."

This section appears to have been introduced for the first time at the revision of the statutes. I have been unable to find any authority for it in previous acts or in the schedule of amendments authorised by 40 Vict. ch. 7, sched. A. (O.) It is, however, now the law by virtue of 41 Vict., ch. 6 (O.), even if not otherwise authoritative.

Section 18 was introduced by 40 Vict., ch. 7 (O.) It recasts and alters the provisions of the Con. Stat., ch. 13, and amendments thereto, and provides that an appeal shall lie from every judgment of any of the Superior Courts, or of a judge sitting alone as and for such courts, in a cause or matter depending in any of the said courts, or under any of the powers given by the A. J. Act, "including judgments" in three or four specified cases, which do not by construction, that I can see, affect the generality of the enactment.

The appellate jurisdiction in respect of all the courts was thus placed on the same footing, being extended as regards the courts of law and assimilated to that which had always prevailed in respect of appeals from a court of equity, a change to some extent rendered necessary by the fusion of the original jurisdiction of all the courts which was then gradually taking place. The procedure in error in respect of error in law in the record and proceedings, though now abolished by rule 472, O. J. A., was retained, as also, though somewhat inconsistently, were the variant provisions as to the limitation of the time for appealing (secs. 45, 46), which, as regards appeals from courts of law, were required to be taken as before in one year from the giving of the judgment, decision, rule, or

order complained of, and as to appeals from Chancery in one year in the case of a decree or decretal order, and in six months in the case of an interlocutory order not being a decretal order.

In *Wall v. The Attorney-General*, 11 Price 643, 668, (1823), the Lord Chancellor said it might be taken to be a general principle that the interlocutory orders of the Court of Chancery might be appealed against, but that no appeal lay from those of the Courts of Common Law, as to which see *Mellish v. Richardson*, 6 Bli. N. R. 70; *Scott v. Bennett*, L. R. 5 H. L. 234.

Seton on Decrees, pp. 2, 3, citing Bla. Com. Book 3, p. 55: "There (is this) difference between appeals from a Court of Equity and writs of error from a Court of Law, that the former may be brought upon any interlocutory matter, the latter upon nothing but only a definitive decree."

I speak with reserve upon a point of equity practice, but I may say that I have been unable to discover any case which determines that every interlocutory order in Chancery which was not of a purely discretionary nature, was not subject of appeal. In *Daniell's Chancery Practice*, 5th ed., 1067, it is said that an order made in chambers by the judge in person is subject to appeal in the usual manner, see also pp. 1341, 1342, and I therefore cannot see that there is anything in the term "interlocutory order not being a decretal order" used in sec. 46, which aids us in attempting to limit the meaning of the term "order" as used in secs. 2 and 45 and (by construction) in sec. 18. Sub-sec. 2 of sec. 22 enables further evidence to be given without special leave on "interlocutory applications." The order in question is one which, having regard to the interpretation clause, sec. 2, if made by the Court of Queen's Bench prior to the Judicature Act, would have been a judgment of the court, and from which, therefore, in the plain words of the statute an appeal would have lain under the 18th section. I see no way of avoiding this conclusion. The consequence is that the case, not falling

within any of the exceptions to the right of appeal, an appeal now lies to this court under sec. 13 of the Judicature Act.

It has been urged, however, that the order was made in the exercise of a discretion which is not reviewable, or which the court ought not to review. In answer to this argument I shall only quote briefly from two cases to shew the principle on which appeals from such orders ought to be dealt with.

In *Jarmain v. Chatterton*, 20 Ch. D. 493, 499, Brett, L.J., said: "The Court of Appeal * * has often explained that even where the decision of the Judge below is simply an exercise of discretion, the Court of Appeal has power to entertain and hear an appeal from it, is bound to a certain extent to hear it as the court has said, yet when what has been done is a mere exercise of discretion the court will not, unless in a very strong case, interfere, and in that sense it may be said that it will not entertain an appeal from discretion, that is, will not entertain the appeal for the purpose of altering the decision." And in *Ormerod v. The Todmorden Mill Co.*, 8 Q. B. D. 664, where an order made by the Judge at the trial, under sec. 57 of the Judicature Act, (O. J. A. sec. 48), directing the issues of fact to be tried by an official referee, was reversed, the same learned Lord Justice said (p. 679): "It has been many times laid down in this court * * that this court has jurisdiction to review the discretion exercised by the High Court, and in the very case of *Ruston v. Tobin*, 10 Ch. D. 558, (where the court had refused to interfere with the discretion of the judge below), I find the Master of the Rolls begins his judgment thus: 'I am of opinion that, as was said in *Swindell v. Birmingham Syndicate*, 3 Ch. D. 133, the Court of Appeal ought not as a general rule to interfere with the discretion of a judge as to the way in which a case before him shall be tried. There may be a case so strong as to induce it to interfere, but it must be a very strong case.' I think that shews that the opinion of the Master of the Rolls was that the court had jurisdiction, but that it ought not to be exercised except with extreme delicacy."

In a short article in vol. 12 of the *Canada Law Journal*, 1876, p. 270, there is a useful collection of cases on this subject.

The next question is whether the defendants have succeeded in shewing that the order ought not to have been made. It is drawn up on reading the orders for security for costs, the bond given pursuant thereto, and the order of the Divisional Court of the 16th February dismissing the motion of the steamship company to set aside the judgment at the trial. The reasons assigned for making it have not been reported, but we were informed on the argument that the court considered the liability of the sureties was at an end when the defendants' motion was dismissed, as the plaintiffs thus became entitled to enter a judgment in the action. If that was the case the order was not wrong, though unnecessary for the protection of the sureties; but if the terms of the bond were not so limited, I am unable to agree with Mr. Aylesworth that the court had an absolute discretion to deprive the defendants of it at that stage of the cause. The papers before us do not indicate any other reason upon which the court might have acted, as for instance, the return of the plaintiff to reside permanently within the jurisdiction, a fact which, under some circumstances, the court might be disposed to treat as a sufficient reason for doing what has been done in this case, although it has not hitherto, that I am aware, been deemed such. I should instance that as an exercise of discretion which this court, though having jurisdiction to do so, would probably be slow to interfere with.

In the printed case agreed on by the parties the bond is said to be in the usual form, which contains *inter alia* the following conditions:

"That if the said A. B. (the plaintiff) discontinue or become non-suit in the said action, or if the said C. D. (the defendant) obtain a judgment or verdict or any other judgment therein, then or in either of said cases if the above bounden A. B. and E. F., &c., do pay, &c." *Chitty's Forms* eds. 1862, 1883.

An appeal to the Court of Appeal is now, by sec. 31 of the Appeal Act, a step in the cause, just as a motion in the Divisional Court against the judgment at the trial is a

step in the cause. Judgment at the trial may be final, as may be the judgment of the Divisional Court, but one is not more final than the other until the time for moving against or appealing from it has elapsed. If it was right to make the order after the judgment of the Divisional Court it would not have been less so to make it after the judgment for the plaintiff at the trial; yet in neither case could it be said that the condition of the bond had been fulfilled so long as the defendants were proceeding in the regular course of the cause to obtain that judgment, other than judgment on verdict, which the condition provides for, and the costs of which the sureties are bound to pay. In short, I think that as the bond is not forfeited merely because the plaintiff is non-suited or has a judgment against him at the trial if he is notwithstanding regularly moving to reverse it, (*Alivon v. Furnival*, 2 C. & M. 555), so neither is the condition fulfilled until the defendants have failed to obtain final judgment by means of such steps or proceedings in the cause as the practice permits them to take. They can, if they please, go as far as the Court of Appeal for that judgment. Different considerations may apply to subsequent proceedings in error to other appellate courts, but into these it is not necessary to enter.

I agree with the views of Wilson, C. J. in *Napier v. Hughes*, 9 P. R. 164, and Boyd, C. in *National Insurance Co. v. Egleson*, ib. p. 202, on this subject, and, therefore, as the time for giving notice of appeal had not elapsed, and the defendants had in fact given it when the order in question was made, I think, with great respect, that this appeal should be allowed, but under the circumstances it should be allowed without costs.

GALT, J., concurred in the judgment of OSLER, J. A.

Appeal allowed, without costs.

DYMENT V. THOMSON.

Sale of goods—Place of inspection—Acceptance of part—Rejection of residue as not in accordance with contract.

The plaintiff contracted with the defendant, a dealer in lumber, to sell him 200,000 feet of 18 foot plank of red or white pine two inches thick and from six to twelve inches wide; "quality the same as he had supplied the previous year," to be paid for by acceptance at three months from dates of shipment. The lumber was to be shipped f.o.b., at the plaintiff's mills to such places as the defendant should direct. A shipment was made of some car loads which the defendant accepted. Subsequent shipments were made, some car loads of which were received and others rejected at Hamilton where the defendant carried on business.

Held, in an action for the price, that under the terms of their contract the inspection should have been made at the plaintiff's mills and [affirming the judgment of the court below] that the defendant could not reject the lumber at Hamilton unless it was shewn that the article delivered was not the article agreed to be delivered: and the evidence failed to shew that the description of the lumber mentioned in the contract was not substantially satisfied.

Per BURTON and OSLER, JJ.A. Although in a contract for the sale of goods not then ascertained, words such as were here used as to quality would amount to a warranty that the article to be delivered should agree with that description there was not evidence to shew a breach of the contract in that respect: Therefore,

Held, that the defendant's only remedy was in damages for the inferiority of the article delivered.

Semble, per BURTON, J.A., assuming that the contract gave the purchaser the right of inspection and rejection at Hamilton, an acceptance and payment for one shipment would not preclude the defendant from rejecting subsequent shipments of the lumber that did not substantially answer the contract.

THIS was an appeal, by the defendant, from the judgment of the Common Pleas Division, [reported 9 O. R. 566.]

It appeared that the plaintiff had three saw mills on the line of the Hamilton & North-Western railway; and that the defendant resided in Hamilton and dealt in lumber.

The plaintiff in his claim set out an agreement to sell to the defendant 200,000 feet of plank of certain dimensions as supplied to the defendant the preceding year, at \$10.25 per M., payable by the defendant's acceptance at three months from dates of shipment and that he had shipped and delivered the plank to the defendant, who accepted and received a portion of the goods, but

refused to accept the whole and would not accept the plaintiff's draft therefor.

The defendant admitted the contract, but alleged that there was a term in it as to the lumber being good, sound, square edged stuff.

He also admitted receiving a quantity of the stuff amounting to the value of \$640, which he was ready and offered to pay; and alleged that the plaintiff shipped to him a quantity of inferior lumber not good, sound, square edged stuff, nor of the same quality as he had purchased the year before, and he refused to accept the same and notified the plaintiff thereof.

The other facts are clearly stated in the former report and in the present judgments.

The appeal came on to be heard before this court, on the 25th and 26th of November, 1885.*

W. Lount, Q. C., and *Kapelle*, for the appellant.

McCarthy, Q. C., and *Pepler*, for the respondent.

February 10, 1886. HAGARTY, C. J. O.—[After stating the facts as above.] At the trial before my brother Galt a great deal of evidence was taken.

Mr. Lount before us stated that under the agreement the plaintiff might ship the lumber from any of his mills, and was to send it anywhere the defendant should order; that the plaintiff was to order the cars on the railway and the defendant was to pay the freight.

It was objected at the trial that as soon as the plaintiff had delivered the quantity of goods on the cars that his contract was fulfilled, and evidence as to quality should not be received; that if the defendant objected to the quality he should have done so at the time of shipment.

The defendant contended that the contract did not so provide.

The learned Judge decided to admit the evidence as to quality and that the defendant might then enter a counter-claim.

**Present.* —HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, J.J.A.

The court adjourned, and next morning Mr. Lount stated that he had decided not to enter a counter-claim, that the jury should find what the contract was and he would give no further evidence as to contract.

Mr. McCarthy, for the plaintiff, offered that the defendant should give evidence as to quality, and not being according to contract, and with a view to reduction in price.

The case then proceeded and much evidence was given.

At the end of the evidence we find "Judgment by consent for plaintiff, \$1,325 with costs."

"It is understood that this arrangement is not to preclude the defendant from moving next term as he may be advised."

As far as we can understand it, the learned judge at the trial, seems to have been of opinion that the inspection, if required by the defendant, should have been at the time of shipment, and it was then agreed that \$90 should be allowed for difference in quality.

A rule was obtained in the Common Pleas Division for a new trial on the ruling that the delivery on the cars was delivery to and acceptance by the defendant, and that he could not reject it on arrival in Hamilton; and for rejection of evidence.

After argument the court discharged the rule.

The learned Judge who delivered the judgment of the court seems to have decided that the defendant was not finally bound by the shipment on the cars, but had the right to inspect and reject at Hamilton, but that "when the article purchased was to be delivered in parcels from time to time, and where the purchaser accepts a portion he has no right to rescind the contract because another portion delivered is made up in part of the article contracted for which answers the contract, and in part does not answer the contract. He must rely upon his action for damages, or give the inferiority in answer *pro tanto* to the claim."

The rule for new trial was discharged, and the defendant appeals.

It was clear that according to the agreement and

understanding of the parties as acted on by them, the lumber was to be shipped in cars and sent as the defendant should direct; it was to be shipped as he should order.

A great number of car loads were despatched from the plaintiff's mills as required by the defendant. Nearly all were directed to be sent to Hamilton. One at least was sent by his orders to London.

Deliveries were made from May till August. About nine cars in all were accepted, and about fourteen rejected in Hamilton. The cars were unloaded by the railway people, and the contents piled up. Acceptances and rejections were curiously mixed up as to time. For instance, the defendant's lumber inspector, Pulling, deposes that eleven cars came together: that they accepted three of these and rejected eight: that he looked at the ends and sides, got up on every car and turned some boards over a course or two: that there was quite a lot of waney edged timber.

"Q. To what extent are you prepared to say from that examination that the condition of imperfection existed?
A. Well, from looking at the outside of these cars, I should judge that there was from 25 to 40 per cent."

The defendant was absent from the country during all these deliveries.

He says he afterwards examined the rejected lumber and formed an opinion that there would be from 35 to 40 per cent. and some of it 50 per cent. culls, say an average all through of 40 per cent.

We may also refer to his evidence, p. 64, as to one car rejected (No. 706). Again, p. 65, as to five or six bad boards in some piles.

It seems very clear from the evidence that car loads were rejected in which certainly less than half of the contents were open to objection.

It was not attempted to be shewn that the contents of any of the car loads had lost the distinctive character of lumber.

It may of course be conceded that the defendant was not bound to accept any parcel of goods which had lost

such character; as has been often said, he was not bound to accept hay for straw or oats for beans.

If he had the right to inspect at Hamilton I think he had no right to act as he did, and as it were, to take one parcel of the goods, say 100 boards, and reject sixty good boards because there were forty bad ones in the same car.

If he had the right to "cull" the lumber, such right could be easily exercised by throwing out the bad and informing the plaintiff of such rejection. Why should the larger proportion, if good, in the parcel be rejected?

I feel great difficulty in acceding to the argument that the right to reject as exercised by the defendant existed at Hamilton.

It must be borne in mind that there is no provision, express or implied, in the bargain between the parties as to inspection by the defendant.

He could, if he pleased, have provided therefor. He might have a person on his behalf to examine the shipments. We must look at the dealing of the parties.

The goods were put in the carriers' hands as directed by the defendant. He paid the cost of carriage. His bargain was to accept a draft at three months from the date of shipment.

The lumber became his property to all intents and purposes as soon as shipped. He would have to bear the loss or destruction in course of transit.

On the 19th June the plaintiff wrote to him respecting a complaint about shortage: "I notice you say you cannot afford to send a man at mills to measure, neither can I afford to lose 300 or 400 feet on each car. * * You can take my measure or send your man, or I will stop shipping."

The defendant admits this.

The plaintiff was bound to ship it to wherever the defendant directed it to be sent. One car was directed to London.

Is it to be understood that at any place, London, Montreal, Quebec, &c., to which the defendant might have

it shipped, he had the right there to inspect and reject, so long as it retained the distinctive character of lumber ?

The contract required him to accept at three months reckoned from the date of shipment. Would not the plaintiff be entitled to an acceptance the day after he had shipped, even if the lumber had not arrived ?

Its delay on the road or its destruction in transit would hardly be an answer to the plaintiff's demand of the acceptances.

All these considerations seem to me to point to the conclusion that if the defendant did not choose to have his interests protected by having his agent to inspect the shipping, he is to be left to his cross action or counter-claim to recover any damages consequent on the sending of any inferior quality of lumber. In this way he could recover his expenses on extra freight, &c., &c.

The property became completely vested in him by the shipments, it was then wholly at his risk, and he was liable to pay therefor by giving his acceptances.

I am unable, therefore, on the facts in evidence in this case, and its peculiar circumstances, to hold that the learned judge at the trial was wrong in his view.

I think it impossible to formulate any general rule applicable to all executory contracts for goods as to any right of inspection and rejection by the vendee when the bargain does not provide therefor. I think every case must be judged by its own facts and circumstances, the nature of the bargain, time, place, conduct of parties, &c., &c.

In *Campbell on Sales* (1881) p. 388, after noticing *Couston v. Chapman*, L. R. 2 H. L., Sc. Ap. 250, and *Heilbutt v. Hickson*, L. R. 7 C. P. 438, it is said : "The rationale of the matter may be put thus:—In regard to faults which are latent at the time of delivery, or where there is, under the circumstances, no opportunity of inspection at or previously to delivery, the purchaser may take delivery relying upon the tender (that is the offering of the goods) as a representation that the goods are according to the description, and in that case his acceptance is not necessarily final, but may be recalled upon discovering the defect, provided he has

made examination as soon as is reasonably practicable, and that he notifies his rejection immediately on making the discovery."

The present Master of the Rolls, in *Heilbutt v. Hickson*, p. 456) says: "Such a contract always contains an implied term that the goods may under certain circumstances be returned; that such terms necessarily contain varying or alternative application, and amongst others the following that if the time of inspection, as agreed upon, be subsequent to the time agreed for the delivery of the goods, or if the place of inspection as agreed upon, be different from the place of delivery, the purchasers may, upon inspection at such time and place, if the goods be not equal to the sample, return them then and there on the hands of the seller. Otherwise the right of inspection given to the purchaser would fail in its primary object."

The same learned judge in *Grimoldby v. Wells*, L. R. 10 C. P. 394 said: "There is here a contract for the sale of goods, and by agreement they are to be delivered before a fair opportunity for inspection arises; for it cannot be said it would be reasonable to hold the defendants bound to examine them when they were delivered to him at half way of the journey. The defendant has a right to inspect the goods, and it seems to me that where the sale is by sample and inspection is to be at some place after delivery, the true proposition is that if the purchaser on such inspection finds the goods are not equal to sample, or if they are in fact not equal to sample, he has a right to reject them then and there."

Benjamin on Sales, (3rd Am. ed.) sec. 701, cites *Pease v. Copp*, 67 Barb. 132 for the position that "if goods are to be delivered by vendor at a certain place, it is the vendee's duty to have some person at the place of delivery to inspect it before it is transported to some other place."

It is not easy to deduce a clear rule from the very large number of authorities on the sale of goods, either on a present or executory contract as to the right to reject or rescind the contract. I can only decide this case on its particular facts, and on these facts I arrive at the conclusion that after the shipments on the railway of lumber answering generally the kind of lumber contracted for,

the vendee had lost the right to reject any number of car loads, because of the inferiority in quality of a portion in each load, but was left to his claim for damages.

Even if it be held that he had a right of inspection and rejection in Hamilton or London or any other point, near or far, to which he had directed the goods to be sent, I think the course he took was wholly unwarranted, and that we cannot interfere with the judgment below by which he was allowed an abatement in the price.

There was a further objection to the defendant's exercise of his alleged right of rejection, viz.: that it was all one contract and that he had no right to accept one parcel and reject the next, not because it did not contain the article contracted for but on account of a part of it being of inferior quality.

This was exemplified in his partial acceptance and partial rejection of the eleven car loads arriving together.

I do not propose to discuss this objection further, as I think the case can be decided on the other grounds.

Campbell on Sales, 165; *Elliott v. Thomson*, 3 M. & W. 710; *Cousten v. Chapman*, L. R. 2 Sc. Ap. 252.

BURTON, J. A.—By the terms of the contract between the parties the seller of the lumber was to ship it to the defendant f.o.b. the cars at the latter's expense.

The general rule under such circumstances is that the seller becomes the agent of the purchaser to select the goods and the appropriation becomes (subject to the qualification I shall presently refer to), complete on their being placed upon the cars; but this is not a conclusive test of the liability of the defendant to pay, inasmuch as in order to sustain an action for the goods or for not accepting them, there must be a specific appropriation of the particular goods assented to by the purchaser and no inference of such assent can be drawn unless the seller has pursued the implied authority by selecting goods which conform to the contract.

In other words, as the contract calls for 18 foot plank

2 inches thick, from 6 to 12 inches wide, the plaintiff could not by shipping on board the car planks of different lengths, thicknesses and width, compel the defendant's acceptance of such shipment or sue for the price.

If therefore this contract is to be construed as one which gave to the purchaser the right of inspection and rejection at Hamilton, I am of opinion that he would not be estopped from refusing to accept a shipment of lumber which did not substantially comply with the contract to furnish plank of certain dimensions, width and thickness, from the fact that a previous shipment had been in compliance with the contract and accepted in consequence; each shipment is to be paid for separately, and before the plaintiff could enforce the acceptance of a draft for the price he would have to shew that he had complied with his portion of the agreement and shipped goods which answered the contract.

Such cases as *Wieler v. Schilizzi*, 17 C. B., 619, have very little bearing upon a case like the present. That was a sale *not by sample and without warranty*, of Calcutta linseed tale quale, and the question was whether linseed, though coming from Calcutta, was what was generally known by the commercial name of Calcutta linseed.

The plaintiff could not, under a contract to deliver plank of a certain specified description, deliver plank of a different description, and as at present advised I think if any shipment contained a material quantity of lumber varying in dimensions from that contracted for, it would justify the purchaser in declining to take any part. He could not venture to accept delivery without exposing himself to the risk of being deemed to have approved of the whole, and rendering himself liable for the contract price, and this no purchaser should in reason be bound to do.

I am not dealing with the question of quality as to which the only warranty was that it should be of the same quality as that supplied in the previous year; this not being a contract as to specific goods, but to supply goods answering a

certain description would, it is true, amount to a condition going to the essence of the contract, whereas in the case of specific goods it is only collateral with the contract and the subject of a cross-action or counter-claim, but I think there was no evidence on which a jury could reasonably find a breach of warranty in that respect.

The mere defect in quality in other respects would not be a ground for rejection unless the article was entirely unmerchantable, and the defendant, I think, has not made out a case to shew that the contract that is a contract for plank of the dimensions specified has not been substantially carried out, but I am of opinion further that the learned Judge at the trial took the proper view of the contract when he held that inspection was to take place in the plaintiff's yard. I should have thought differently if the contract had been to deliver to the defendant at Hamilton, but it is sworn and not denied that the plaintiff was to ship to any point the defendant ordered, and it could not have been in the contemplation of the parties that the defendant should have had the right to reject at numerous points at a great distance from the plaintiff's mill, and where it might be impossible to dispose of the property to advantage.

As to the general importance of the question so strongly urged upon us by Mr. Lount, the answer is, that parties can, by being more explicit in their contracts, avoid the differences of opinion which have arisen in the construction of this one. I agree that the appeal should be dismissed.

PATTERSON, J. A.—As far as the terms of the contract are to be gathered from the correspondence, they are, I think, plain enough.

The negotiation begins by the plaintiff's letter of 25th January, 1884, offering to furnish 200,000 feet 2 inch plank, 18 feet, for the same price and terms as last summer. Then the defendant replies with stipulations as to quality and price, also defining the width of the plank. He says he will take 200,000 feet, 2 inch, 18 feet, 6 inch up to 12, good, sound, square edge, fit for car flooring, at \$10, three

months. The plaintiff does not close with this, but says he cannot furnish 2 inch plank, 18 feet, for less than \$10.50 per thousand, acceptance at three months. The defendant then varies his offer, and says he will take 200,000 feet cut as follows: 2 x 6, 2 x 8, 2 x 9, 2 x 10, 2 x 12, 18 feet, at \$10.25, three months, and it must be good, sound, square edge stuff, red and white pine. Here he drops the requisite "fit for car flooring," does not offer to take any widths from 6 to 12 inches, but excludes 2 x 7 and 2 x 11, and adds the term "red or white pine." The plaintiff does not close with that offer either as to sizes or quality, but states what he will give for the price. His letter is: "I will accept your offer for the 200,000 feet of 18 foot plank, 2 inches, from 6 to 12 inches wide, quality same as I supplied you last year, your acceptance at three months from date of shipments." Without further correspondence the defendant directs him to ship the lumber, and it is sent forward.

It is plain that the last letter, which bears date February 23rd, 1884, contains all the terms of the contract which can properly be gathered from the correspondence.

Those terms cover two things which, for the purpose of this contest, may be again noted. They are, 1st, the thing to be supplied, which was plank of red or white pine, 18 feet long, 2 inches thick, and any width from 6 to 12 inches; and, 2nd, the quality of the article, which was to be the same as that supplied the year before.

The price and mode of payment are also set down, and that, though not now in dispute, is of some importance in aiding to establish another term of the contract which the correspondence does not directly state, namely, that the delivery was to be on board the cars, and not at any place to which the defendant might order the lumber to be sent.

Much of the contention of the defendant for his right to reject at Hamilton a number of car loads of the lumber while he accepted other loads was based upon the view of the contract that the property did not vest in him until

he had had an opportunity of inspecting it at whatever place he directed the plaintiff to send it to. I do not intend to discuss this palpably extravagant contention. It has been dealt with by his lordship the Chief Justice and also in the court below by Mr. Justice Rose, who gave the judgment of the court.

I shall content myself with putting in a very few words my understanding of the legal position of the parties.

I cannot find after a careful consideration of the reported evidence any ground for the suggestion that the article delivered was not, in the case of every car-load, the article agreed to be delivered. It was 18 feet plank of red or white pine, 2 inches thick, and from 6 to 12 inches wide.

The description was substantially satisfied. I thought for a moment that one car load might have failed to satisfy it, for Mr. Pulling, the defendant's inspector, in a letter written by him in the defendant's name on 3rd July, said that Car 126, shipped as 18 feet, was only 12, 14, 16 feet corporation, but when I noticed that he said nothing about that in his evidence and that Car 126 does not appear in the statements concerning this contract, I concluded that Mr. Pulling had made a mistake, or that that car load belonged to another transaction.

Then if the article delivered was the article agreed to be delivered, the dispute is narrowed to the quality, and the place of inspection is not so material as it seemed to the litigants at one time to be.

The quality is said to have, to a certain extent, fallen short of what it should have been. To what extent might not be very easily decided under the evidence, because the defendant's estimates are of a very general nature, and are moreover founded on the terms of his offer which was rejected, and on one of the terms which in his correspondence he had himself dropped, viz., "fit for car flooring," and not upon the actual contract which called only for the quality supplied the year before.

But all inquiry on that head is superseded by the fixing

of \$90 as the measure of the inferiority in quality, and that has been allowed to the defendant.

The plaintiff is in my opinion clearly entitled to retain his judgment and this appeal should be dismissed.

OSLER, J.A.—I had stated my reasons for dismissing the appeal in a short judgment, which however, after listening to that which has just been delivered by Mr. Justice Burton, I think it unnecessary to read, as the latter fully expresses my own views.

BORTHWICK V. YOUNG.

*Lender and purchaser—Purchase by sample—Purchase by inspection—
Defect in quality—Caveat emptor.*

The plaintiff, a fruit dealer in Ottawa, went to Montreal for the purpose of buying fruit where he met the defendant, who had a quantity of apples for sale. The defendant in answer to a question by one H., his agent, said they would be found to be "a good lot," and H. opened several barrels for the purpose of plaintiff examining the contents, which he did in five or six instances, when the apples "appeared to be good." The plaintiff might, had he so desired, have examined all the barrels; but having previously bought apples packed by the defendant which proved satisfactory, and placing reliance on the reputation of the defendant for being an honest packer, he refrained from any further examination, and purchased 138 barrels, which, on subsequently attempting to sell, proved to be so inferior in quality that parties refused to buy; others returning what they had bought. Thereupon the plaintiff instituted proceedings to recover compensation for the defect in value. The Judge of the County Court withdrew the case from the Jury, and entered a nonsuit, which subsequently in term was set aside.

Held, on appeal, that as the sale was not a sale by sample, and the plaintiff had not been deterred by any acts or conduct of the defendant from making a full examination or inspection of all the barrels, the defendant was not liable on any warranty, expressed or implied, and that the maxim *caveat emptor* applied.

THIS was an appeal from a judgment of the judge of the County Court of the county of Carleton setting aside a non-suit entered at the trial, and came on for hearing on the 18th November, 1885.*

* *Present*.—BURTON, PATTERSON, and OSLER, JJ.A.

The facts sufficiently appear in the judgment.

Walkem, Q.C., for the appellant.

Aylesworth, for the respondent.

Ormrod v. Heith, 14 M. & W. 651; *Ward v. Hobbs*, 3 Q. B. D. 150; *Jennings v. Broughton*, 17 Beav. 234, 5 D. M. & G. 126; *Benjamin* on Sales, 4th Am. ed. secs. 430, 454, 461a were referred to.

January 26th, 1886. OSLER, J. A.—I think that the view on which the learned Judge of the County Court acted in entering a non-suit at the trial was the right one and I gather from his subsequent judgment setting it aside, which is the subject of this appeal, that he retained the same opinion though he deferred to the views of the two Judges who sat with him and heard the motion for a new trial under the authority supposed to be conferred by the Local Courts' Act.

The plaintiff puts his case as an action for deceit in fraudulently representing the quality of certain apples sold to him by the defendant. He also contends that he is entitled to recover upon a warranty of quality, and the statement of claim seems to me sufficiently to present both forms of action. The evidence, however, establishes neither.

It appears that the plaintiff was a retail dealer in apples, &c., and the defendant was a fruit grower. The former had on a previous occasion bought apples grown by the defendant, and hearing that he was about to forward, or had forwarded, apples to Montreal in the fall of 1883 telegraphed one Hart, a commission merchant there, to whom they were consigned, to hold them until he could go down. Soon afterwards the plaintiff went to Montreal and met the defendant at Hart's office, and an appointment was made to go up to the wharf where the apples were and examine them.

What occurred there is thus described by the plaintiff: "Dr. Young was at the wharf when we went there; Mr. Hart asked the Doctor what kind of apples he had. He

said we would find them a good lot. Hart opened several barrels for me to examine, I think in all five or six. The apples appeared to be good. Called Young's attention to one variety, asked him as to their keeping quality; he said they were a good apple. I conferred with Hart, asked him his opinion of the apples. He said they were a good looking lot of apples and thought they would satisfy me. I told him if he thought they were all right I would give \$3.50 per barrel. Hart then went over and conferred with the defendant. When Hart made the remark that they were a good lot of apples he said that the Doctor was a good packer (an expression, which according to the plaintiff's understanding of it, meant a reliable packer, an honest packer, a man that would pack his apples to correspond with the face of the barrel.) There was a separate lot about six barrels of what we call seconds. Young asked me if I would take the culls or seconds. I told him I did not want them. Hart spoke to him again, said he could sell the seconds—said then that Dr. Young would accept my offer of \$3.50. He was acting for Young, not for me."

It subsequently turned out that the apples were not of the same quality throughout the barrels, the best having been packed in the tops while those below were of an inferior quality. "We found that on the top end of the barrel, some of them, there would be about half a bushel of good apples, some not that many, some more. About four or five layers. It would depend on the size of the apple. There were some good apples all through them:—not all culls below."

In cross-examination :

Q. You do not as a dealer expect in buying apples to find the same apples below that you do on top. A. No, not quite. Q. You would not complain ordinarily if you did not find the apples below not equal to what they are on top. A. Not unless there is too much of a difference.

Q. You know that the practice is universal to put the best apples on the top? A. It is prevalent, but not universal.

Q. Why did you not go down three or four layers, as you usually do? A. I had heard considerable about Dr. Young's packing as a packer.

Q. Then you relied on his reputation? A. Yes.

Q. And for that reason you did not examine the apples at all? A. I examined by seeing what was on the top.

Q. You did not examine the apples? A. Yes, I examined.

Q. Do you mean to say that opening a barrel and looking at the top is examining? A. It is the usual examination.

Q. You bought those apples on the reputation of Dr. Young? A. Yes, and from what I saw on the top and also the opinion of Mr. Hart.

Q. Who did Mr. Hart represent there? A. I was under the impression that he represented Dr. Young.

Q. Did you place it on Mr. Hart's judgment whether you should buy those apples or not? A. I can hardly answer that question.

Q. Did you tell Mr. Hart that if he was satisfied with the apples you would buy them? A. Yes, I told Mr. Hart that. I asked him his opinion of the apples. He said: "They are a good looking lot of apples, Borthwick;" and I said, "If you think they are all right I will buy them."

Q. Then you acted on Mr. Hart's judgment? A. On the two combined.

Q. On your own judgment and Mr. Hart's judgment you bought the apples? A. Yes.

Q. But you left Mr. Hart to determine, really, whether you should buy the apples or not? A. To a certain extent.

Q. If he had not said to buy the apples you would not have bought them? A. If he had not approved of the apples I would not have bought them.

Q. I want you to state accurately what the representation was that you speak of then as not having been fulfilled? A. The representation by words from Dr. Young was that they were a good lot of apples. The expression was used that they were a good lot of apples, and the apples were shewn to me.

Q. You were examined some short time ago in this action? A. Yes.

Q. Do you remember making this statement: "The balance were standing on end and I could have examined all the apples?" A. Yes, I do not think there would have been any objection made to my examining them.

Q. Did you make this statement: "I did not inspect the apples carefully because the defendant's reputation as a packer is so high that I did not think it worth while?" A. Yes.

Hart was called, but his evidence carried the case no further.

The jury assessed the damages for the loss sustained by plaintiff on the sale of the apples at \$69.

Regarding the case in the first place as an action for deceit, for a false and fraudulent representation as to the quality of the apples, and assuming that the defendant's commendation of his goods and the mode in which he had packed them might amount to a representation of that character, I think it clear that the plaintiff's own evidence negatives the idea that he was misled by or relied upon it. On the contrary it appears that he relied upon his own judgment, upon his own experience of the defendant's probity, upon his reputation, as he says, and upon the judgment and opinion of Mr. Hart. He cannot say he was deceived by what the defendant said and did, since that, as he admits, did not prevent him from making a more rigid examination.

But I do not wish to concede that the plaintiff is, under the circumstances, entitled to say that there was a fraudulent representation since he had a full and fair opportunity of inspecting the apples, and was not prevented from doing so by any device or practice on the part of the vendor, and the defect complained of was one which would have been discoverable on a further inspection than the plaintiff satisfied himself with. "In general where an article is offered for sale, and is open to the inspection of the purchaser, the common law does not permit the latter to complain that the defects, if any, of the article are not pointed out to him. The rules are *caveat emptor* and *simplex commendatio non obligat*. The buyer is always anxious to buy as cheaply as he can and is sufficiently prone to find imaginary fault in order to get a good bargain, and the vendor is equally at liberty to praise his merchandize in order to enhance its value if he abstains from a fraudulent representation of facts, providing the buyer have a full and fair opportunity of inspecting it, and no means are used for hiding the defects." *Benjamin*, on Sales, sec. 430; *Smith v. Hughes*, 6 Q. B. D. 597.

If it had been shewn that the defendant had done or said anything to evade or discourage a more searching inspection, or after the partial inspection had heard and assented to Hart's expression of opinion to the plaintiff of his honesty as a packer, the case might have worn a different aspect as regards the question of fraud. But I do not find these ingredients in the evidence.

I think the case {also fails on the alleged warranty. There was no express warranty, and no breach of any implied warranty. The apples were fit for sale and merchantable, in fact, though not all of the quality of those packed in the tops of the barrels, the statement that they were good apples was no more than that *simplex commendatio* which every vendor is at liberty to make of any article offered by him for sale, and I cannot agree that the packing the best apples on the top can be treated as an implied warranty that the contents of the barrels were of the same quality throughout, the barrels having been offered for and open to inspection and nothing done or said by the vendor to deter the purchaser from making as thorough an inspection as he pleased. He knew that the custom of packing the best apples on the top was, as he said, prevalent though not universal, and he chose to take the apples in reliance on his own judgment and that of Hart, without requiring an express warranty. To me the case seems in all respects one for the application of the rule, *caveat emptor*. I should add that nothing appears on the evidence to indicate that in advising the plaintiff Hart was acting as the agent of the defendant, or that the plaintiff sought his advice or opinion in that character.

I think, therefore, that the appeal should be allowed; and that the non-suit entered at the trial should stand.

BURTON and PATTERSON, JJ.A., concurred.

RE CANADA TEMPERANCE ACT.

Canada Temperance Act, 1878—Scrutiny of votes, power of County Judge to direct—Mandamus.

On appeal the judgment of Rose, J., (9 O. R. 154), that a County Court Judge will not be compelled by mandamus to inquire on a scrutiny of ballot papers under sections 61, 62, and 63 of the Canada Temperance Act of 1878, as to personation, bribery or the status on the voters' list of the parties voting, was affirmed by this court, it appearing that the point was covered by a judgment of the Supreme Court of Canada in *Chapman v. Rand*, in which the judgment appealed from in this case was cited and approved of.

THIS was an appeal from the judgment of Rose, J., reported, 9 O. R. 154, where the facts are fully and clearly set forth and came on for hearing on the 17th December, 1885.*

J. J. Patterson, for the appellant.

Crothers, for the respondent.

January 12, 1886. HAGARTY, C. J. O.—The question which arises on this appeal is the same as that which was recently decided by the Supreme Court of Canada in the case of *Chapman v. Rand*,† in which the judgment of my Brother Rose in this case was cited with approval. We follow that decision and dismiss the appeal.

BURTON, J. A.—I express no independent opinion as to the correctness of the judgment appealed against, which I think is covered by that of the Supreme Court in *Chapman v. Rand*, which is binding upon this Court.

It is somewhat strange that although in the case of what are called corrupt practices there is no express declaration that the person guilty of them shall lose his vote, the hiring of teams, which by sec. 86 is declared to be simply an unlawful act, imposes upon the voter the penalty of

**Present.*—HAGARTY, C. J. O., BURTON, PATTERSON, and OBLER, JJ. A.

†Not yet reported.

disqualification, although there would, under the judgment in *Chapman v. Rand*, be no means of striking off the vote of such a person.

I can only say that, if such be the law, the sooner the legislature interferes the better.

There are a great many people who feel that it savors rather of despotism to invest a bare majority of the electors in a limited locality with the power to confiscate property—for we cannot avoid seeing that that is the effect of the enactment—and interfere with private rights to the extent permitted by it; but it might not unreasonably be urged to be an intolerable evil, if this majority can be secured by personation and other corrupt practices without any possibility of obtaining a reversal of the decision thus fraudulently obtained; and we cannot doubt that the knowledge of such an uncontrollable power to obtain the adoption of the Act will be made use of by zealous partisans, not over-scrupulous as to the means by which the end is secured.

I can scarcely believe that Parliament ever intended to grant such a power, although it may by inadvertence have omitted to make provision for setting aside decisions thus obtained at the poll; and looking at the serious results to individuals by the passage of such a measure, I am not satisfied merely to concur in the judgment without expressing a strong opinion that such an omission in the Act cannot have been intentional.

PATTERSON and OSLER, JJ.A., concurred with the Chief Justice.

Appeal dismissed, with costs.

**TORONTO STREET RAILWAY COMPANY V. DOLLERY AND
JEFFERYS.**

*Owner or contractor—Removal of building, damages resulting therefrom—
Liability of owner—License to remove house—City by-law.*

The defendant Jefferys, owner of a frame tenement in Toronto, agreed with his co-defendant Dollery for the removal thereof to another part of the city, such removal to be made at D.'s own risk and without damage to that or any other property. Both defendants contemplated and intended that the house was to be drawn and moved along Sherbourne street for some distance. Under a by-law of the city, all persons were prohibited under a penalty from moving any building into, along, or across any street without the written permission of the board of works. In this case no such permission was obtained, and in the course of hauling the building along the line of the track of the plaintiffs one of the sills was upset, thus preventing its further removal for two days, during which time the plaintiffs sustained loss by the non receipt of fares and damage to their property.

Held, [BURTON, J.A., dissenting] that Jefferys, as well as Dollery, was liable for the loss so occasioned,

Per OSLER, J.A. As the plaintiffs had, by their charter, the superior right of user and occupation of the street, a duty was cast upon J. to see that proper precautions were taken to prevent injury arising from obstructing the railway by means of the building of which he was procuring the removal, and which could not from its size be removed along the street without obstructing the traffic.

THIS was an action brought by the Toronto Street Railway Company in the County Court of the county of York against James Dollery and C. T. Jefferys for damages alleged to have been sustained by the plaintiffs through the unlawful and negligent removal of a house along and across Sherbourne street, a highway occupied by the plaintiffs' railway.

The defendant Jefferys was the owner of a house situate on Earl street, which he was desirous of moving from Earl street to a lot on Wellesley street. This necessitated its being drawn down Sherbourne to Wellesley, and across the tracks of the railroad easterly to the point on Wellesley street.

To accomplish this he, on the 9th of August, 1884, contracted with the defendant Dollery in writing to move the house, the agreement for which, signed by Dollery, was as follows:

" I, the undersigned, hereby agree to furnish all plant, tools and labor, and remove now one rough-cast house, together with detached kitchen from the back of No. Sherbourne street. Convey and fix the same on cedar posts in a good, sound and perfect order on to lot No. 5. south side of Wellesley street east, at my own risk, and without damaging this or any other property in removing same for the sum of 100 dollars. Money to be paid at completion of work."

The action came on to be tried before the junior judge (McDougall) without a jury, on the 26th of May, 1885, when it was shewn that a by-law of the city of Toronto (No. 467, sec. 19) provided that :

" No person shall remove, or cause or permit to be removed, or assist in removing any building into, along, or across any street or sidewalk in the said city, without having first obtained leave in writing from the board of works."

It was also shewn that the defendant Dollery had applied for this permission to the proper authorities, but leave was refused him unless he first produced the consent of the plaintiffs whose tracks would have to be crossed. This consent he did not or could not obtain, and without further attempt to procure the consent of the city authorities, Dollery commenced the removal of the house.

In the course of his operations his plant, or one of the sills of the house, broke down, and as a consequence one track of the plaintiffs' railway was blocked for two whole days. This, it was shewn, compelled the plaintiffs to take off about half the cars usually running on the Sherbourne street line, and also necessitated all the cars on the down line to be jumped off the track just behind the building obstructing the track, and to be jumped on the down line again below the building. The necessity of thus derailing cars also required additional horse power, and the cars which were run during the continuance of the obstruction were compelled to use two horses instead of one horse. Evidence was adduced to shew considerable damage done to the cars by this process of pulling them on and off the track, by straining and by some actual breakages of springs, gearing, and other parts of the cars. The superintendent of the plaintiffs' company swore that in his opinion the damage was at least \$1.00 a trip to each car.

The actual damage proven, including hire of some extra men for the two days to assist the cars on and off, amounted to between \$50 and \$60. No claim was set up for loss of profits.

Three questions were raised on the evidence and pleadings: 1st. Was the moving of the house an unlawful act? 2nd. Could the plaintiffs recover any damages, the by-law above cited in prohibiting the moving of houses without the permission of the board of works providing for a breach of its provisions a pecuniary penalty of \$20 in the shape of a fine? 3rd. If the plaintiffs were entitled to damages, could they recover against the defendant Jefferys, the owner, as well as against the defendant Dollery, the contractor?

After taking time to look into the authorities cited his Honor, after stating more fully the facts above set forth, remarked: "The very fact that the defendant Jefferys thought it necessary to stipulate in his agreement that the contractor should move the building 'at his own risk, and without damaging this or any other property in removing same,' shewed that he contemplated the possibility of some of the damage that actually ensued, if not to the railroad company, as he himself admits possibly to the wires of the telephone or telegraph companies *en route*. In other words, as put by Cockburn, C.J., in *Bower v. Peate*, 1 Q. B. D. 321: 'He directs an act to be done from which injurious consequences will result unless means are taken to prevent them * * * contenting himself with securing to himself pecuniary indemnity in the event of any claim arising from damage to the adjoining property. He is, therefore, not in the position of a man who has simply authorised and contracted for the execution of a work from which, if executed with care, no injury can arise, and who is therefore not to be held responsible if, while the work is going on, injury arises from the negligence of the contractor or his servants.' I am of opinion therefore that both the defendants are liable for the damages occasioned by what I must hold to have been their joint wrongful act. As the plaintiffs are more concerned in having a decision upon the legal merits, upon the facts in this case than the recovery of damages, I fix the damages at the sum of \$60. I shall enter a verdict in favor of the plaintiffs for \$60

damages, with full costs of suit against both defendants, and order judgment to be entered up upon such verdict. At the request of counsel I grant a stay of entering of judgment for ten days."

The defendant Jefferys thereupon appealed to this court, and the appeal came on to be heard on the 22nd October, 1885.*

Delamere, for the appellant.

Shepley, for the respondents.

The authorities cited are mentioned in the judgments.

January 26, 1886.—HAGARTY, C.J.O.—I draw as conclusions of fact from the evidence, that the appellant knew that Dollery intended to draw the house from Earl Street down along Sherbourne Street, and that it was not in serious contemplation to go North-east and then South by various other streets to reach Wellesley Street, a distance at least five times longer than the course actually taken.

He admitted this in his preliminary examination, (p. 6.) though at the trial he professed that he did not expect Dollery to go one route more than another.

2. I also find that from the size of the house, and the width and state of the street, both parties knew that the house would have to be dragged to Wellesley Street over and obstructing one of the tracks.

3. I also find that in the nature of the proposed work both parties must have known and did know that its performance must necessarily obstruct and interfere with the ordinary uses of the highway, and in all reasonable probability be a serious nuisance, especially to the plaintiffs' track, and that the breaking or giving way of a sill was not an unlikely event to happen.

The moving of a house along public streets may not be designated as an unlawful user of the highway: 1 Dillon 723 (1882). It is only, I presume, a question of degree

* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

between a frame building and a huge van of merchandize, beams of timber, &c.

But, in the nature of things, the removal of a building is a very peculiar operation, and its creating or not creating a public nuisance must depend on the size of the house, the width of the highway, &c.

Under their proper power the city council had by by-law prohibited, under pecuniary penalties, any persons from moving any building into, along or across any street in the city without the written permission of the board of works.

No such permission was obtained in this case, the appellant had Dollery's undertaking to make the removal at his own risk "and without damaging this or any other property in removing the same."

Appellant, as to this proviso and as to what he contemplated, says (p. 12): "I meant that he might run foul of anything on the way—there were trees, houses, fences, telegraph poles, and walls. I did not know what he might run against." He was asked as to the street railway; he says: "I did not think he was going to get into any bother about it,"

I do not rest plaintiffs' right to damages on the violation of the city by-law.

If they have the right to recover, I prefer placing it on firmer ground. The reversal by the Court of Appeal of *Atkinson v. Newcastle Waterworks Co.*, 2 Ex. D. 441, and the rough criticism there applied to such cases as *Couch v. Steel*, 3 E. & B. 402, must make such a ground of recovery rather doubtful.

But the city by-law may be referred to as indicative of the strong view taken by the municipal authorities on the subject of house removals, in the exercise of their statutable powers to legislate as to the obstruction of their streets.

After making the bargain, appellant was urging Dollery to get the building moved as his (appellant's) time was up, and Dollery told him p. 13, he had to get a permit from

the city. Appellant did not know whether he got that or not.

The cases bearing on the general question, are very numerous. They are discussed at great length in the 9th ed. of *Story on Agency*, (1882,) secs. 453, 454, 455.

I have read very many of them and find much diversity of opinion, and also a gradual abandonment of the ground taken in some of the earlier cases, and of some distinctions drawn between the use of real and personal property. See on this point Lord Cranworth's, (then Rolfe, B.) judgment in *Reedie v. London and North Western R. W. Co.* 4 Ex. 244.

The first case I shall notice rather favors the appellant's view.

In *Peachey v. Rowland*, 13 C. B. 182, A. employed B. to construct a drain in a public highway. B. employed C. to fill in the earth over the brick work and carry away the surplus. C. left the earth raised so much above the level that the plaintiff driving in the dark was upset and injured. Held, A. was not liable. Maule, J., said, "I do not say that there might not be such a thing as a contractor employing another to do that which would be a public nuisance. There is no pretence here for saying that the defendants were the persons who committed the nuisance. Can you shew that they ordered the thing complained of to be done? * * If the thing complained of, that is, the work which the defendants procured to be done, could not be done otherwise than in an unlawful manner, no doubt they would be responsible for the consequences. But unless you can show that the work was so done, that the defendants might have been indicted for obstructing a public highway, they are not liable in this action." He considered that *Overton v. Freeman*, 11 C. B. 868, governed the case.

In *Ellis v. Sheffield Gas Co.*, 2 E. & B. 769, (1853) the defendants had employed contractors to break up the streets to put down gas pipes, having no lawful authority so to do. The workmen heaped up earth and the plaintiff was injured. Lord Campbell says: "I am clearly of opinion that if the contractor does the thing he is employed to do,

the employer is responsible for that thing as if he did it himself. I perfectly approve of the cases that have been cited. In those cases the contractor was employed to do a thing that was perfectly lawful: the relations of master and servant did not subsist between the employer and those actually doing the work, and therefore the employer was not liable for their negligence. He was not answerable for anything beyond what he employed the contractor to do, and that being lawful he was not liable at all * * The defendants had no right to break up the streets at all; they employed W. & Co. to break up the streets, and in so doing to heap up earth and stones so as to be a public nuisance, and it was in consequence of this being done by their orders that the plaintiff sustained damage."

Wightman, J., concurring, says: "But for the directions to break up the streets, the accident would not have happened." Erle, J., says, "The cause of the accident was the very thing done in pursuance of the specific directions of the defendants contained in their contract; that, in my opinion, makes the distinction between the present case and those cited, in which the cause of the accident was the negligence of those doing the thing, not the thing itself."

This case is apparently viewed in a very different light from that of *Peachey v. Rowland*, already cited, and *Burgess v. Gray*, 1 N. B. 590.

In *Hole v. Sittingbourne R. Co.*, 6 H. & N. 488, the company was authorised by charter to build a bridge over a navigable channel, the Act providing that it should not be lawful to detain any vessel longer than sufficient to pass those ready to traverse the bridge and for opening to admit vessels. The company contracted with A. to construct the bridge. Before the completion of work the bridge got out of repair and could not be lifted, a wheel being broken. It was held that the company was liable for the delay to plaintiff's vessel.

Pollock, C. B. there observed: "The short ground on which my judgment proceeds, is that this does not fall within that class of cases where the principal is exempt from responsibility because he is not the master of the person whose negligence or improper conduct has caused the mischief. This is a case in which the maxim, '*qui facit per*

alium facit per se, applies. When a person is authorised by statute or bound by contract to do particular work he cannot avoid responsibility by contracting with another person to do that work. * * * When the act complained of is purely collateral and arises incidentally in the course of the performance of the work the employer is not liable, because he never authorised that act. The remedy is against the person who did it. * * * There is a distinction between mischief which is collateral and that which directly results from the act which the contractor agreed and was authorised to do."

Wilde, B., after noticing the difficulty of formulating the principle in words, says: "The distinction appears to me to be that when work is being done under a contract, if an accident happens and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists. But when the thing contracted to be done causes the mischief and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, there the employer must be taken to have authorised the act and is responsible for it."

If this definition be sound, it would, I think, well support the plaintiffs' contention.

The contract here was to take a large frame house on to the public highway for a considerable distance along a street. The building was so large as necessarily to completely obstruct a large portion of that highway, of which the Street Railway Company had the lawful user. The blocking up or obstructing of their highway must be necessarily an injury to them, if it prevented their cars from passing. The breakdown of one of the sills caused the obstruction to be prolonged for two days to the plaintiffs' serious injury.

It seems difficult to bring such a case into the ordinary rule of non-liability for a contractor's default.

In *Pickard v. Smith*, 10 C. B., N. S., 478, the defendant got his coal supply through a hole in the floor of the railway station. He employed coal merchants to supply him, and they left the trap-door of the hole open and

plaintiff was injured. It was held that the opening of the trap for delivery of the coal was to be considered the defendant's own act, although it is expressly held that the coal merchant was not his servant, the coal merchant opened the trap. The court, after noticing the objections as to non-liability for the act of a contractor, say: "The rule is inapplicable to cases in which the act which occasions the injury, is one which the contractor was employed to do, nor by a parity of reasoning to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employees, but neglects its fulfilment whereby an injury is occasioned. * * The act of opening the trap was the act of the employer, though done through the agency of the coal merchant, and the defendant having thereby caused danger, was bound to take reasonable means to prevent mischief."

The only case I have seen bearing directly on the removal of a house, is *Day v. Green*, 4 Cush. (Mass.) 437, before Shaw, C. J. The mayor of a city had granted a license to remove a building through the streets. His license was illegal, as the board of Aldermen had imperfectly delegated this power to him.

The building was being moved, but in consequence of the state of the streets and the stormy weather, the moving was commenced Saturday morning and was left that afternoon.

The mayor after notice to the plaintiff on Saturday evening, had the building dragged a short distance from the travelled part of the street and left there. On Monday plaintiff applied for permission again, but was refused without payment of the charges of dragging it off the track on Saturday, which was refused. Plaintiff brought trespass against the mayor. It was held that the mayor was not estopped from disputing the validity of the license granted by him. I only cite the case for the remarks of the Chief Justice—a Judge of very high repute: "That it is often useful and convenient that buildings should be removed is found by experience. It may often be done with little or no inconvenience to the public under suitable and proper restrictions, adapted to each particular case,

and therefore it seems highly proper that the power to authorise and regulate it, should exist somewhere. * * But the right to do what the plaintiff did in the present case, to move a building in the street so large as effectually to encumber and obstruct it, and upon an emergency preventing the complete removal in a single day, to leave it on the street for two or more nights, was not claimed as a common law right to the reasonable use of the highways, but the plaintiff placed his demand wholly on the validity of his license and his compliance with the terms and conditions on which it was granted."

I have read with care the case in our Supreme Court of *Walker v. McMullen*, 6 S. C. R. 241. The judgment of Sir Wm. Ritchie, acquiesced in by the rest of the Court, except Mr. Justice Gwynne, appears to rest on the provisions of the New Brunswick Act, under which it was held that buildings erected contrary to its provisions should be public nuisances. On this, at p. 264, the learned Chief Justice says he prefers to rest his decision. Apart from the statute I gather that the learned Chief Justice inclined to hold the defendants liable on the general law.

The very elaborate judgment of Mr. Justice Gwynne (who dissented) reviews at length most of the authorities, English and American.

The decision in the House of Lords, *Hughes v. Percival*, 8 App. Cas. 443, had not then been pronounced. In that case Lord Blackburn in effect declared his dissent from *Butler v. Hunter*, 7 H. & N. 826, a case relied on in some measure by Gwynne, J. The latter learned Judge says at p. 304: "I can see no principle upon which this case can be taken out of that class of cases which is governed by the principle involved in the relation of master and servant, unless a jury should first find as a fact upon the authority of *Peate v. Bower*, 1 Q. B. D. 321, and *Angus v. Dalton*, 6 App. Cas. 829, that the accident was in the natural course of things to be apprehended as likely to occur from the erection of defendant's building; that the risk was obvious as necessarily attendant upon the erection of the building: but I cannot well see how upon the evidence a jury could come to such a conclusion, nor if they should how it could be upheld by the courts without practically reversing nearly all the cases

which have been decided upon the principle involved in the relation of master and servant, and modifying that principle."

I am not able to see how this decision of the Supreme Court can govern our decision here, as the case was disposed of on wholly different grounds from those on which this case rests.

We may now turn to *Bower v. Peate*, 1 Q. B. D. 321, so much discussed of late years.

The head note fairly gives the result of the decision: "A man who orders a work to be executed on his own premises lawful in itself, but from which, in the natural course of things, injurious consequences to his neighbours must be expected to arise unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else to do what is necessary to prevent the act he had ordered to be done from becoming wrongful."

In rebuilding the defendant's house he made his foundations to a lower depth than the plaintiff his neighbour's wall went. He contracted with one Rae to do the work, to take all the risk of shoring up and supporting the adjoining buildings, &c. From insufficient shoring, &c., or want of other support, injury occurred to plaintiff's wall, &c., which was entitled to support.

The judgment of Cockburn, C. J., is very full.

The injury, he says, resulted from the contractor's negligence, and he states fully the ordinary rule exempting the employer. He says the defendant "directs an act to be done from which injurious consequences will result unless means are taken to prevent them in the shape of additional work, but omits to direct the latter to be done as part of the work to be executed, contenting himself with securing to himself a pecuniary indemnity in the event of any claim for damages to the adjoining property." In this he refers to the absence of any directions as part of the contract to execute the necessary shoring or underpinning.

A long sentence in the judgment, at p. 326, is said by

Lord Blackburn in *Hughes v. Percival*, at p. 446-7, to be in his view rather too broadly stated.

In *Bower v. Peate* the court speaks with approval of *Pickard v. Smith* and of the correctness of the judgment delivered by Williams, J.

In the famous case of *Angus v. Dalton*, 6 App. Cas. 740, the facts were somewhat similar. At page 829, Lord Blackburn, after stating the general rule as to employer and contractor, the former not being liable for the latter's "collateral negligence" unless the relation of master and servant exist between them. "On the other hand," he says, "a person causing something to be done, the doing of which casts on him a duty, he cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it." He cites *Hole v. Sittingbourne R. W. Co.*, *Pickard v. Smith*, *Tarry v. Ashton*. He adds that the reasoning in *Bower v. Peate*, is more satisfactory than in *Butler v. Hunter*.

The decision of the Court of Appeal was affirmed. In that court, Thesiger, L. J., p. 185, holds that the law laid down by the Lord Chief Justice in *Bower v. Peate*, is correctly stated, and "placed on proper principles, and the defendants in the present case who have ordered work to be executed, from which in the natural course of things injurious consequences to plaintiff's factory might be expected to arise unless means to prevent them were adopted, are responsible for the damages which have in fact arisen owing to the means adopted having proved to be insufficient."

Cotton, L. J., says, at p. 188: "I agree with the decision in *Bower v. Peate*, that where a defendant has employed a contractor to do work which in its nature is dangerous to a neighbouring property and damage is the result of the work done, the employer is liable, although he has employed a competent contractor and given him directions to take precautions in executing the work:" *Hughes v. Percival*, 9 Q. B. D. 444, and in the Lords, 8 App. Cas. 443, the same principles were much discussed.

Lord Blackburn re-states his view of the law and that it is clearly laid down in *Pickard v. Smith*, and finally in *Angus v. Dalton*. "But in all the cases on the subject there was a duty cast by law on the party who was held liable." He then comments, as already noted, on a sentence in Sir Alex. Cockburn's judgment in *Bower v. Peate*, and expresses his dissent from *Hunter v. Butler*.

Tarry v. Ashton, 1 Q. B. D. 318, is also referred to, and it may be read with *Pickard v. Smith*. The defendant had a large lamp projecting over the street. It fell and injured plaintiff passing by. Defendant had recently employed a competent person (held not to be his servant, but an independent contractor) to examine and put it in thorough repair. The breakage was occasioned by general decay. Defendant was held liable.

Blackburn, J., says: "It was the defendant's duty to make the lamp reasonably safe; the contractor failed to do that, and the defendant having the duty has trusted the fulfilment of that duty to another who has not done it."

Milligan v. Wedge, 12 A. & E. 737, is very distinguishable. The defendant purchased a bullock in Smithfield Market, and according to the by-law of the city employed a licensed drover to drive it home. The drover employed a boy. On the way the animal ran into plaintiff's shop and did damage; the defendant was held not liable.

I am unable to see any satisfactory distinction between the case of injuring the neighbour's wall or house, and the interference with the lawful user by that neighbour especially and the rest of the public in general of an adjacent highway. I do not read the authorities as depending on any such distinction.

The shopkeeper in *Tarry v. Ashton* would, I think, have been equally responsible had the old lamp fallen on the plaintiff from a pole carried by a man along the street as a kind of advertisement of the defendant's business, or had it been erected by him in front of and off his premises, say by leave of the municipality.

In *Pickard v. Smith*, it was his duty to guard properly

the hole in the railway platform, so as to protect the passengers and to prevent its being a nuisance or trap to them. "No sound distinction (says the judgment of the court, p. 479) can be drawn between the case of a public highway and a road which may be, and to the knowledge of the wrongdoer probably will in fact be used by persons lawfully entitled to do so. The opening of the trap was an act equally likely to be injurious to such passengers as throwing a stumbling-block in their way would have been."

On the whole I am of opinion that the appeal must be dismissed.

I think the law cast a duty on the employer in this case not to do or authorise the doing of an act the natural effect of which was to create a nuisance on the highway. That, conceding that it was not unlawful to move a building over the street, the duty was cast on him to have it done in such a manner and with such precautions that there should not have been the utterly unreasonable delay and continued obstruction to the general inconvenience—the "*commune nocumentum*"—of the public and to the special damage and injury of the plaintiffs. As was said by Coleridge, J. (4 E. & B. 577), "There was no reason why, if the work could not be done properly, it should be done at all."

I assume that every unreasonable user of a highway to the injury and prejudice of another is a wrong, and that the law casts a duty on every one not to unreasonably obstruct others in their lawful user, and that any person causing a thing to be done which in its nature must be known to be likely to seriously and unreasonably obstruct such lawful user, cannot shelter himself from direct responsibility by contracting with another to do the work.

BURTON, J. A.—As my learned brothers have arrived at a different conclusion, I suppose I must be wrong, but after giving the fullest consideration to their reasons I retain the opinion I formed upon the argument, that upon the facts in evidence, and the findings of the learned Judge in this case, the action is not maintainable against the appel-

lant who employed an independant contractor to remove a building for him from one portion of the city to another. As the authorities appear to bear this out, and I find it impossible to concur, I feel that I ought to state my reasons for disagreeing.

The general rule is plain that any one who contracts with a competent and fit person exercising an independent employment to do a piece of work *not in itself unlawful* or necessarily attended with danger to others according to *the contractor's own methods*, except as to the results of his work, will not be answerable for the wrongs of such contractor committed in the prosecution of the work.

No case can be found in which an employer has been held liable for the acts of an independent contractor, which does not fall within the instances given in the rule above formulated. The cases relied on in the argument and referred to in the Chief Justice's judgment, contain another ingredient not to be found in the present case. I refer to such cases as *Bower v. Peate*, 1 Q. B. D. 327; *Gray v. Pullen*, 5 B. & S. 970; *Hole v. The Sheerness and Sittingbourne R. W. Co.*, 6 H. & N. 488; *Tarry v. Ashton*, 1 Q. B. D. 314; *Pickard v. Smith*, 10 C. B. N. S. 470.

The principle underlying these cases is, that the employer cannot escape the burden of *an obligation imposed upon him* by engaging for the performance of it by a contractor. *Whatever he is bound to do must be done*, and although he may have a remedy against his contractor for the failure of the latter to discharge *his* duty, strangers to the contract are still at liberty to enforce the rights conferred upon them by law against the employer who authorised the act. For instance, in *Bowers v. Peate*, the injury was done to an adjoining house by excavating a cellar on the defendant's own premises. That excavation, however carefully performed, was certain to lead to mischief, and must inevitably have done so unless proper steps were taken to prevent it by shoring up the building; *it was incumbent therefore on the defendant* to foresee such mischief, and to take precautions against it, and the Court

there held that the proprietor could not by employing a contractor relieve himself from *the liability he would have been under* if he had undertaken to do the work himself.

It was assumed in that case that the plaintiff was entitled to the support of the adjacent soil of the defendant for his house.

The defendant knew that in the natural course of things injurious consequences to his neighbour's house *must of necessity* arise unless means were adopted by which such consequences might be prevented, knowing that he was himself bound to see to the doing of that which was necessary to prevent the mischief, and could not relieve himself of that responsibility by employing some one else.

Those means were not provided, and the removal of the soil was followed by actual damage, *and the act of removal was therefore wrongful*, as causing a wrong done to the plaintiff. But the act of removal was an act done by the order and authority of the defendant.

Pickard v. Smith was decided on the same principle. Williams, J., in a portion of his judgment, refers to the general rule as I have stated it: that no one can be liable for an act or breach of duty unless it can be traceable to himself or his servants in the course of their employment: consequently if a contractor is employed to do a lawful act, and in the course of the work he commit some casual act of wrong or negligence, the employer is not answerable: and then proceeds that the rule is inapplicable to cases in which the contractor is entrusted with the performance of *a duty* which is incumbent upon his employer, and neglects its fulfilment whereby an injury is occasioned. In that case it was the employer's duty to see that the hole through which the coals were shot, was kept guarded when open; he entrusted that duty to the coal merchant and he neglected it.

In *Gray v. Pullen*, 5 B. & S. 970, the Court below, consisting of Cockburn, C. J., and Crompton, Blackburn and Mellor, JJ., were of opinion that the contractor only was

liable; but the judgment was reversed on the ground that a duty was imposed upon the employer who caused the drain to be made to fill it up in a proper manner and *it being incumbent upon him to do it*, if he authorised a contractor to do the very thing which the law required him to do he could not avoid his responsibility.

Hole v. The Sheerness and Sittingbourne Railway, 6 H. & N. 488, was decided on the same principle, viz., that where a person is authorised by Act of Parliament or bound by contract to do particular work, in that case the building of a bridge over a navigable river, in such a manner as not to detain vessels beyond a certain time, he cannot avoid responsibility by contracting with another person to do that work; and Wilde, B., in my opinion draws the distinction very clearly when he says, "Where work is being done under a contract, if an accident happens and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question of whether the relation of master and servant exists; but where the thing contracted to be done causes the mischief and the injury can only be said to arise from the authority of the employer, because the thing contracted to be done is imperfectly performed, then the employer must be taken to have authorised the act and is responsible for it." The question there did not arise from any negligence of the contractor, but the work itself was done in accordance with the contract, and was, therefore, the very thing which the defendants authorised the contractor to do.

Tarry v. Ashton was also decided on the ground that the lamp on the defendant's premises was out of repair, and so a nuisance to the knowledge of the defendant. It was the defendant's duty to put it in repair or remove it. He entrusted the fulfilment of that duty to some one else who did not fulfil it.

The principle of these decisions is clear and intelligible and the decisions themselves commend themselves to one's common sense; but they have no application to the case we are dealing with.

The result of the decisions is, that if the act or neglect which produces the injury is purely collateral to the work contracted to be done, and the result of the wrongful acts of the contractor, the proprietor is not liable; but if the injury directly results from the work which the contractor engaged and was authorised to do, he is equally liable with the contractor, or, as the rule is stated in a New York case, there are but three cases in which the proprietor is liable.

1st. Where the person doing the act stands towards the proprietor in the relation of employee or servant.

2. Where the act as authorised by a contract between the proprietor and actor necessarily produced the injury.

3. When the injury was occasioned by the omission of some duty imposed on the proprietor.

These rules coincide exactly with the English decisions, to which I may add as flowing from these rules the case I have already referred to, that a person cannot excuse the doing of an act unlawful *per se* by alleging that it was done by another who contracted to do it for him.

The cases cited, it will be seen are all cases relating to fixed property, but the general rule to which I have referred is applicable to all cases subject to the same exceptions.

I had written thus far before my attention was called to *Hughes v. Percival*, 8 App. Cas. 443, the last judicial utterance I can find upon the subject, and independently of its being a decision of the House of Lords, the fact that the principal judgment was delivered by Lord Blackburn gives to it in my eyes additional weight.

He places the liability precisely on the ground I have indicated.

If, he says, such a duty was cast upon the defendant he could not get rid of responsibility by delegating the performance of it to a third person. He was at liberty to employ such a third person to fulfil the duty which the law cast on himself, and if they so agreed together to take an indemnity to himself in case mischief came from that

person not fulfilling the duty which the law cast upon the defendant, but the defendant still remained subject to that duty and liable for the consequences if not fulfilled.

He then says that that was the law clearly laid down in *Pickard v. Smith* and in *Dalton v. Angus*, but in all the cases on the subject there was a duty cast by law on the party who was held liable. He takes exception however to Sir Alexander Cockburn's definition in *Bowers v. Peate* as being too broadly stated, which if taken in the full sense of the words would render persons liable who were expressly held not liable in a Court of Error in *Quarman v. Burnett*, 6 M. & W. 499.

We must carefully bear in mind that in that case as in *Bowers v. Peate*, there was admittedly a duty on the part of the defendant the premises being adjoining, and Lord FitzGerald in giving judgment says: "The conclusion I have reached is that the defendant had undertaken a work which as a whole necessarily carried with it considerable peril to his neighbours." In the execution (bear in mind not the negligent execution of that work) the wall was so injured that it fell in and injured the plaintiff's premises.

I propose to deal with the case not upon any theories of my own, but on the findings of the learned judge, which have not in any way been questioned and in the correctness of which I agree, with the exception of its being absolutely necessary to take the building along Sherbourne Street, and to apply the law to the facts so found.

He finds first that although not in the contract itself it was necessary, in order to its fulfilment, that the house should be drawn down Sherbourne to Wellesley and across the tracks of the railroad easterly to the point of Wellesley Street. As to the causes of the injury he expresses himself as follows: "The fact of the house breaking down after all was the cause of most of the damage, and even at common law, I am of opinion that there is sufficient evidence to shew that the house was not moved with reasonable diligence and care, and if this is a correct finding of fact the action would lie at common law. The breaking down was *prima facie* evidence of negligence, and it was

not shewn that any care was used in preparing the building properly for such a long journey, and nothing was shewn by the defendants to explain the cause of the accident and break-down which caused the long obstruction." To which I would add that there was no evidence of any other damage, so that we have it found by the Judge that the injury was caused by want of reasonable diligence and care on the part of the other defendant. If he had followed the first finding with a further finding that the injury occurred in the prosecution of the work without any default or negligence on the part of the contractor, I am not prepared to say the employer might not probably be liable. He would under such circumstances have clearly been so, if the contract had provided that he should take the building down Sherbourne Street, or if that had been the only street; but where the contractor was left at liberty to take it by that street, or by a more circuitous route, it may be a nice question whether the liability would attach. That, however, is not now before us for decision, under the finding that the injury occurred through the negligence of the contractor.

It was conceded and could not with reason be denied that the work was not unlawful, *per se*, and the Judge has found that apart from the want of a license it was not unlawful or an unreasonable user of the highway previous to the accident.

It is no more illegal to remove a house along the highway than to convey heavy loads of goods or bulky articles such as engines, boilers, iron safes, squared timber, or timber got out for the masts of men-of-war; the inconvenience to which the rest of the public have to submit is greater than when it is caused by the user of a light carriage or other vehicle, but it is a lawful user of the highway, and at the present day the rollers and appliances in use for such a purpose are generally of so excellent a character that the work is usually accomplished successfully and easily.

I quite concede that if the act itself was illegal, this

defendant would be equally liable with the contractor, and whether there was negligence or not; but the act or neglect causing the injury was, as found by the learned Judge, that of the contractor—something which the defendant did not authorise or intend to authorise. He had no control over the contractor, and did not pretend to exercise any. The act was not only not unlawful, but was not necessarily dangerous, and for all that appears if it had been properly done no injury would have been sustained by any one.

The only point upon which I have felt any doubt, arises from the existence of the city by-law, the full contents of which are not before us, but it does provide that no one shall remove a building along the streets without a license from the city; and provides a penalty for its violation. How ought that to affect this defendant?

He contracted with the other defendant to do the work, and at the time of making the contract swears, if that is material, that he was not even aware that a permit or license was necessary, and although subsequently informed of it, was told by his co-defendant that he was going to obtain one. It is not like a case where the act is altogether prohibited, but is one in which it is lawful if only a license or permit is obtained.

I should think that where the act is not actually unlawful and necessarily attended with danger, and a contract is given which it is possible for the contractor to carry out in a legal manner, it must, according to all legal principles, be assumed that it was understood by all parties that the work would be done in the ordinary way and with all proper precautions not to cause mischief. That was the view taken by the Court in *Butler v. Hunter*, 7 H. & N. 832, and is one constantly acted upon in the ordinary affairs of life. Every presumption being in favor of things being legally done, the fact that the co-defendant stipulates to do the work at his own risk, and not to injure any property, has, to my mind, been unduly strained against the present defendant instead of being construed as evidence in his

favor, and I agree with Baron Wilde's remarks in the case I have just referred to, where he says: "Then it is said that the defendant ought to have given orders to do the work in a tradesmanlike way, or ought to have found out what was requisite. But it seems to me it would be unreasonable to require an unskilled person to point out to a skilled person in what way the work should be done."

How can it be said that the defendant employed the co-defendant to do the work "*coute qui coute*." All the contract contemplated and all that the defendant contemplated was that the contractor was to do the work in a proper and in a legal manner.

The decision in *Butler v. Hunter*, it is true, has been questioned as applied to the facts of that case, inasmuch as the defendant was under an obligation, as in *Bower v. Peate*, to shore up the plaintiff's wall. Yet the remarks I have quoted apply to a case in which no such obligation exists, and the work contracted to be done is not necessarily attended with danger.

Here the work was not unlawful, and was not necessarily attended with danger, and the employer was not under any legal obligation to any one. The contractor undertook to do it with the knowledge his employer did not possess that a permit was necessary, and if he has not done it in a proper or in a legal manner he alone is responsible for it. The defendant never employed or authorised him to do it negligently or illegally.

The case of *Ellis v. The Sheffield Gas Co.* 2 E. & B. 767, is very different. There the thing contracted to be done was absolutely illegal to the knowledge of both employer and contractor, viz., 'to create a nuisance by breaking up the highway.

I wish to add a word as to the alleged danger of moving a building as to which there is no evidence. I have already pointed out as matter of general information of which even Judges might be presumed to be cognizant, that by the appliances at present in use the work is accomplished with ease, without danger, and with comparatively little inconvenience to the public, and I think there is

every reason to believe that but for the accident it would have been accomplished successfully.

In the case of *Daniel v. The Metropolitan R. W. Co.*, in the House of Lords, (L.R. 5 H.L. 45), the work which the contractor undertook to do—the placing in position of very heavy iron girders upon walls over a line of railway then in operation, and therefore work in the execution of which very great danger was involved—it was held that the falling of one of these girders was not a mischief, the employers were bound to anticipate and against which they were bound to take precautions &c. Lord Westbury took occasion to remark: “The ordinary business of life could not go on if we had not a right to rely upon things being properly done when we have committed and entrusted them to persons whose duty it is to do things of that nature, and who are selected for the purpose as being experienced in the matter and are held responsible for the execution of the work. * * *

It would create confusion in all things if you were to say that the man who employs others for the execution of such a work has no right whatever to believe that the thing will be done carefully and well, but that he is still under an obligation to do that which to him in many cases would be impossible, viz., to interpose from time to time in order to ascertain that that was done correctly and properly, the business of doing which he had rightfully and properly committed to other persons.”

To which might be added that that very interference and control would render the employer liable as well as the contractor.

I cannot distinguish this case from what is every day occurring in our own community of a manufacturer contracting with Messrs. Hendrie or other persons to deliver heavy articles, such as engines and boilers, and when in course of delivery they have to pass along a street on which the rails of this company have been laid, I am quite sure such persons have never imagined they were liable to make good any injury caused to the railway company by the persons with whom they have contracted, either through negligence or otherwise; or thought of inquiring whether a permit was required or had been obtained.

I do not think anything turns upon the provisions of the company's charter that enables them to lay their rails on the public streets which otherwise would in law amount to a nuisance. The public are not, however, deprived of their rights over the streets or over the rails, although the company are entitled to precedence in the use of the rails. For an interference with their rights the contractor was held, and properly held, liable, but I am unable to discover any ground for extending that liability to his employer.

PATTERSON, J. A.—In my opinion the decision of the learned Judge of the County Court ought to be affirmed.

The defendant Jefferys took from his co-defendant Dollery an agreement by which the latter agreed to remove a house from Earl street to Wellesley street at his own risk and without damaging that or any other property in removing the same.

It was impossible to do the work without crossing Sherbourne street with the house, and there can be no doubt that as a matter of fact the route contemplated by both parties was down Sherbourne street from Earl street to Wellesley street.

The contract thus involved the employment of Dollery to move the house down Sherbourne street.

It is further made clear, and must have been known to both parties, that the house could not be moved either across or down Sherbourne street without incumbering for a time the track of the street railway company.

The intention of Dollery the contractor was to do the work at night, after midnight, when the railway cars were not running. He hoped to be able to be clear of the track before they began to run in the morning; and if he had succeeded no interruption of the traffic would have occurred. But it unfortunately happened that one of the rollers under the house struck a stone when turning down Sherbourne street, which caused a sill to turn over, and the consequence was that the house obstructed the railway

track for two days ; one day being occupied in repairs and the other in moving the house down the street, it being found impracticable to move it at night without risk of doing more damage.

The street railway company is authorised by its Act of incorporation, 24 Vict. ch. 83, to use and occupy such parts of the streets as may be required for the purpose of the track ; and the cars have the right of way upon the track in preference to other vehicles.

The case of the *Toronto Street Railway Co. v. Fleming*, 35 U. C. R. 264 ; 37 U. C. R. 116, may be referred to as recognising in these rights an interest superior to the easement over the street enjoyed by the general public.

Under the Acts respecting Municipal Institutions, now consolidated in 46 Vict., ch. 18, (O.), Sherbourne Street being one of the highways of the city is (by sec. 526) under the jurisdiction of the city council, and that council has power (by sec. 550) to make by-laws for preventing and removing obstructions upon any roads within its jurisdiction. A by-law is in evidence (No. 467, sec. 19) which declares that no person shall remove, or cause, or permit to be removed, or assist in removing any building into, along or across any street or sidewalk in the city without having first obtained leave in writing from the board of works.

The defendant Jefferys seems not to have been aware of this by-law when he made the contract with Dollery, but was told by the latter before he began to move the house that a permit was necessary, and he supposed Dollery would get one. Dollery did apply, but was refused a permit unless he first arranged with the Street Railway Company, and in fact no leave to move the house was obtained.

Under all these circumstances, I cannot see that the learned Judge was wrong in holding the defendant Jefferys liable, as well as Dollery the contractor, for the interruption of the plaintiffs' business.

In taking the house on to the railway track the contractor did what, in effect, he was employed to do. Whether

his project of moving it down to Wellesley Street and away from the track during the night and early morning was feasible may be doubted, in view of the experience which made it necessary at last to take daylight for the operation.

It is therefore not improbable that the occupation of the track, to the interruption of the traffic to some extent, would have been inevitable even if the accident had not happened. But however this may be, there is no tangible ground for attributing the accident to negligence of the contractor or regarding it otherwise than as a contingency naturally incident to the undertaking, and more likely to happen at night than in daylight.

The case of *Ellis v. Sheffield Gas Co.*, 2 E. & B. 767, somewhat resembles this in the essential facts. The obstruction there was by a trench for laying gas pipes, and earth thrown up in digging it. Lord Campbell, C. J., said: "I am clearly of opinion that if the contractor does the thing which he is employed to do the employer is responsible for that thing as if he did it himself. * * The defendants had no right to break up the streets at all; they employed Watson Brothers to break up the streets, and in so doing to heap up the earth and stones so as to be a public nuisance; and it was in consequence of this being done by their orders that the plaintiff sustained damage."

In *Pickard v. Smith*, 10 C. B. N. S. 470, Williams, J., delivering the judgment of the Court, said: "Unquestionably no one can be made liable for an act or breach of duty unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable. To this effect are many authorities, which were referred to in the argument. That rule is, however, inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor by a parity of reasoning, to cases in which the contractor intrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned." *Pickard v. Smith*

is cited by Lord Blackburn in *Hughes v. Percival*, 8 App. Cas. 446, as clearly laying down the law as he again lays it down in that case, and in *Bower v. Peate*, 1 Q. B. D. 321, 326.

The liability of the employer seems necessarily to follow from an affirmative answer to the question, Did : Jefferys employ Dollery to move the house down Sherbourne Street? And that he did so I take to be quite as directly made out as that the defendants in *Ellis v. Sheffield Gas Co.* employed their contractors to pile earth upon the street. It was necessarily involved in the employment to take the house to Wellesley Street, just as the piling of the earth was involved in the employment to dig the trenches.

In my opinion the appeal should be dismissed.

OSLER, J.A.—The question is, whether under the circumstances the owner of a personal movable chattel which another person has contracted to remove from one place to another along the public highway, is responsible in damages for an injury sustained by a third party in consequence of the negligence of the contractor or his assistants in the course of such removal.

The general rule I take as stated by Williams, J., in *Pickard v. Smith*, 10 C. B. 470, 480 :

“Unquestionably no one can be made liable for an act or breach of duty unless it be traceable to himself or his servants in the course of their employment, consequently if an independent contractor is employed to do a lawful act, and in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable.” And in *Reedie v. London and North Western R. W. Co.*, 4 Ex. 244, Rolfe, B., in giving judgment, says :

“The liability of any one other than the party actually guilty of any wrongful act, proceeds on the maxim *qui facit per alium facit per se*.”

Hence the employer is answerable for such consequences as flow from the execution of the work in a lawful

manner, that is to say, where the very act which the independent contractor is employed to do, is the cause of the injury. So again if the act to be done is, either at common law, or by statute unlawful, or if the injury proceeds from the neglect of any duty which the law casts upon the employer, he is liable, since he cannot escape the responsibility of causing the unlawful act to be done, or of seeing that the duty is performed by delegating it to another. In all such cases the maxim referred to applies.

In the case in hand, the defendant Dollery was an independent contractor, the thing contracted to be done, namely, the moving of the house along the street, was lawful, and if done in a careful manner could have injured no one. The case therefore turns upon the question, was there under the circumstances any duty due from the defendant Jefferys to the plaintiffs in relation to the act contracted for?

If I thought the fair result of the evidence was that the contract with the defendant had been made wholly without reference to the route to be taken in moving the house, I should have little hesitation in holding that the defendant Jefferys was not liable. The case would then be entirely within the general rule which exempts the employer. The selection of Sherbourne street must then have been treated as the sole act of the contractor and he alone would have been responsible to the plaintiffs for any damage resulting from the improper use of such street. But I think we must hold as an inference of fact that both parties contemplated and intended that the house was to be drawn and moved along Sherbourne Street, for some distance, and from the size of the building it was evident that this could not be accomplished without making use of that part of the highway on which the plaintiffs' railway was laid down. Of this part of the highway the plaintiffs had by their charter (24 Vict., c. 83, ss. 4, 5) the superior right of user and occupation, and no one was at liberty to use it so as to interfere with or impede their enjoyment of it. That being so it seems to me that

when the defendant contracted for a work necessarily, involving the use of something in which the plaintiffs had rights such as I have described, the work being of a character obviously to endanger such rights, a duty was cast upon him to see that proper precautions were in fact taken to prevent injury arising from obstruction of the railway by means of the building of which he was thus procuring the removal. To adopt the language of Lord Blackburn in *Percival v. Hughes*, 8 App. Cas. 443, I think the duty went as far as to require him to see that reasonable skill and care were exercised in an operation which involved a user of the plaintiffs' track, exposing their property therein to the risk I have mentioned. I rest my decision on the single ground that the defendant procured to be done on property in which the plaintiffs had an easement or franchise something which was obviously hazardous to their enjoyment of it. I think the principle on which *Percival v. Hughes* was decided is closely applicable and shews that a duty was then incumbent upon him which he could not evade by delegating it to a contractor, to see that reasonable skill and care were exercised in doing the work.

Had the work involved merely a crossing of the track in proceeding along another street the case would be entirely different.

In thus holding I consider that I am not in the slightest degree infringing upon the law as laid down in *Quarman v. Burnett*, 6 M. & W. 499, and that class of cases.

I would dismiss the appeal.

Appeal dismissed, with costs. [BURTON, J.A., dissenting.]

CONWAY V. THE CANADIAN PACIFIC RAILWAY COMPANY.

*Railway companies—Liability of company to construct fences—Occupants—
42 Vict ch. 9, (D.) and 46 Vict. ch. 24. (D.)*

The plaintiffs occupied about an acre of lot 29 adjoining the railway of the defendant company. Their horses pasturing on another part of the lot, which the plaintiffs did not occupy and to which they had no title, passed on to the track and were killed by a passing train.

Held, [affirming the judgment of the Q. B. D.] that the plaintiffs were not entitled to call upon the defendant company to fence across the part of the lot from which the horses escaped; and, therefore, that the company were not liable to make good their loss to the plaintiffs.

THIS was an appeal from the judgment of Cameron, C. J., before whom the action was tried (October 15, 1884), at the Pembroke Autumn Assizes, and who directed the plaintiffs' action to be dismissed and judgment to be entered for the defendants; and also from the judgment of the Queen's Bench Division, given on the 9th of February, 1885, discharging an order *nisi* to set aside the judgment for the defendants, and enter judgment for the plaintiffs.

The facts appear in the report of the action in the court below, 7 O. R. 673, and in the present judgments.

The appeal came on to be heard before this court on the 20th November, 1885.*

Osler, Q.C., and *Gorman* for the appellants.

Hector Cameron, Q. C., and *W. R. White*, for the respondents.

February 10, 1886. HAGARTY, C. J. O.—The section substituted by the Act of 1883 for sub-secs. 1, 2 and 3 of section 16 of the Act of 1879 can hardly be said to be very felicitously worded.

I do not propose to discuss any point not directly involved in the decision of this case.

“ In the case of a railway already constructed on any section or lot of land, any part of which is occupied * * fences shall be erected and maintained over such section or lot of land on either side of the railway,” &c.

* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

On the best consideration that I have been able to give the matter I have come to the conclusion that this partial occupancy is referable to the rest of the lot or section held or claimed in the same hand or title, and that the protection intended to be given is to the owner or claimant of the lot, although he may actually occupy only a part thereof. If the plaintiff's contention be sound, and the railway passed along the north end of a 200-acre lot, and she occupied an acre thereof at its south-east or south-west angle a mile south of the railway track, and she neither had, nor ever claimed to have, a shadow of right or claim to the remaining 199 acres, she would be entitled to recover.

I can hardly think that Parliament intended such a result or to impose such a burden on the company. The subsequent words of the clause: "Or before such construction within six months after any part of such section or lot of land has been taken possession of by the company for the purpose of constructing a railway thereon, (and in the last case after the company has been so required in writing by the occupant thereof)," &c. These words seem to me to point to "the occupant" as a person occupying the section or lot having, or at least claiming to own or to be in possession of the whole, for which he gives such notice.

If the facts required the plaintiff to come under this provision as to notice I cannot see how her notice could, at the best, avail for any land except the small parcel in her actual possession. Could she by notice require them to fence on the north side of the track, she residing on the south side?

In sub-section 2 * * "the company shall be liable for all damages * * to the cattle, horses, or other animals of the occupant of the land, in respect of which such fences, &c., have not been made," &c.

I think these words again point to the owner or actual occupant of the land which they are bound to fence, not to the casual occupant of a small portion of the lot or parcel required to be fenced on each side of the track.

In the view I take of this it is not necessary to deter-

mine whether this substituted section confers additional protection and privileges on mere occupants as distinguished from actual proprietors or owners.

Conceding for the purposes of this suit to the plaintiff that she is an occupant, within the meaning of the section, of this acre or half acre, I think we are bound to hold that she cannot claim against the company that they must fence the whole of lot 29, to which she claims no right or interest.

BURTON, J. A.—The General Railway Act of the old Province of Canada, which has been virtually re-enacted by the Ontario Legislature, contained two provisions in relation to fences.

One making it absolutely obligatory upon the company to fence their track on both sides, and the other having reference to any lands taken for the purposes of the railway, as to which the companies were under no obligation to fence until requested to do so after the expiration of six months.

The one provision had for its object, mainly, the protection of the passengers and trains passing over the track, the other the protection of the proprietor's lands from trespasses from cattle straying from the lands of the railway.

The Act declared in general terms that until such first mentioned fences were erected the company should be liable for all damages which might be done by their trains to cattle, horses, or other animals on the railway.

Under this enactment there has been a uniform line of decisions that the railway companies were liable only to the proprietors of the lands adjoining the railway.

In the Dominion Acts of 1868 and 1879 a change was made, probably from the circumstance that many of the railways under their jurisdiction would pass through wild lands.

The obligation absolutely to erect fences whenever the company commenced to operate the road was done away with, and in no case was the company required to fence until the expiration of six months after taking the land.

and not even then until required to do so by the proprietors of the adjoining lands, but until the fences were erected the company were declared liable for all damage done to cattle by their trains.

This liability, however, would extend only to the injuries occasioned to the animals of such adjoining proprietors or of animals on the land with their permission.

But in 1883 the sections in question, of the Act of 1879, were repealed and others substituted under which the question in this case arises, and it is certainly not surprising that the language employed should have given rise to a great diversity of opinion as to what was intended.

The new sections refer to three cases :—

1st. Where the railway has been constructed before the passing of the Act on any section or lot of land which is occupied.

2nd. Where it has not then been, but shall be subsequently constructed, and

3rd. To cases having no necessary reference to construction—where land is taken for the purpose of constructing the railway.

As to the first of these (which is the case we are dealing with) the company are bound to erect fences within three months from the passing of the Act, over such section or lot of land on each side of the railway.

As to the second, within three months after construction.

And as to the third, within six months after the land shall have been taken possession of, and after the company have been required in writing by the occupant to do so.

The section omits all reference to proprietors except in the proviso, which is as follows: "But this clause shall not be interpreted to the profit of any proprietor or tenant in any case wherein the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars."

The next section differs from the repealed sections, inasmuch as it limits the recovery to injuries to cattle, horses or animals of the occupant of the land.

What, then, is meant by this enactment? Is it intended merely to relieve the company from the obligation to fence unless the proprietor is in occupation? or is it intended to confer additional rights upon a person who is a mere occupant, having no title to the land?

And lastly, if that be the proper construction, was it intended to extend the right of such occupant beyond that which the law, under the decisions, accorded to a proprietor? That is to say, that in order to entitle him to recover he had to be the proprietor of lands adjoining the railway.

I confess I find it very difficult to see how any other construction can be placed upon the words than, at most, to extend to persons occupying land adjoining the railway the same protection which a proprietor so situated enjoyed under the former enactment; the language used is not happy but bearing in mind the decisions under the former enactment, that the protection afforded against injuries extended only to the proprietors of lands adjacent to the railway, one can place a meaning which is intelligible enough on the words "any part of which is occupied," where the person so in occupation of part, owns the whole, his possession of part extends constructively to the whole of the land covered by his deed, and it is to my mind a strong reason for believing that the legislature intended to confine the act to owners or persons in occupation with title.

It seems impossible to suppose that having reference to the proviso I have cited, where the proprietor of a lot has accepted compensation for dispensing with the erection of gates and bars, a mere occupant could insist upon having them, and still less that an occupant of an acre in the rear of the east half of a section, half a mile it may be from the track, could insist on the track being fenced along the whole section, although the west half might be owned by a non-resident proprietor.

As the law stood formerly, if A owned one half of a lot abutting on the railway, and B the other half, the company were bound to fence as against A or be liable to him for

damages arising from such want of fences, but they would not be liable to A because they had not erected fences on B's portion of the lot. Is an occupant of A's portion without title, to be in a better position than A himself?

Without expressing anything beyond the inclination of my opinion as to the construction of the section in other respects, I feel satisfied that a person having no position but that of an occupant without title must be in occupation of land adjoining the railway before he can hold the company liable for want of fences, and that the right to such fencing must be confined to that portion of the lot in his occupation which borders on the railway track; and that as the plaintiffs were not, at the time of the killing of the horses, even the occupants of the land from which the horses strayed upon the defendants' railway against the proprietors or occupants of which they were alone bound to fence, the action cannot be maintained, and the appeal should be dismissed.

PATTERSON, J.A.—The most important of the questions for decision are those concerning the construction of the Dominion Statute, 46 Vict. ch. 24, the 9th section of which substitutes a new section 16, for section 16 of the Consolidated Railway Act, 1879.

The Act of 1879, sec. 16, re-enacting the 11th section of the Railway Act, 1868, had declared that "within six months after any lands have been taken for the use of the railway, the company shall, if thereunto required by the proprietors of the adjoining lands, at their own costs and charges erect and maintain on each side of the railway, fences of the height and strength of an ordinary division fence, with sliding gates, commonly called hurdle gates, with proper fastenings, at farm crossings of the road for the use of the proprietors of the lands adjoining the railway, and also cattle guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on the railway."

This enactment varied from the provisions on the same subject in the Consolidated Statutes of Canada, ch. 66, secs. 13, &c., in some important particulars.

The last mentioned Act imposed the duty absolutely on railway companies to fence their railways, having in view, as may not unreasonably be supposed, the safety of passengers and others on the trains, as well as the protection of the cattle of the adjoining proprietors. There was a clause (sec. 10) which required the company within six months after taking lands *for the use of* the railway, not necessarily lands on which the railway was to be constructed, to make, if requested by adjoining proprietors, a sufficient fence to keep off hogs, sheep, and cattle; but once the railway was constructed the duty to fence along each side of it was absolute.

Under the Acts of 1868 and 1879 the obligation to fence so as to keep cattle from getting on the railway, and apparently the duty to make cattle guards at road crossings, depended on the request of adjoining proprietors; and the duty as to fencing was confined to fencing on each side of the railway, and no longer extended to fencing between other lands, such as station grounds or borrowing pits, and the adjoining lands of private owners.

In other respects those statutes substantially adopted the language of section 13 of the Consolidated Statutes of Canada; wherefore the decisions of our courts under section 13, respecting the persons entitled to claim damages for injury to cattle for want of sufficient fences, would have applied to section 16 as it stood in 1879. Those persons were held to be the proprietors of the land adjoining the railway from which the cattle escaped on to the railway by reason of the absence or defective state of the railway fence, and others whose cattle were on the lands with the license of the proprietor, or not as wrongdoers or trespassers against him.

The new section 16 made important changes. It enacted that "within three months after the passing of this Act, in the case of a railway already constructed on any section or lot of land, any part of which is occupied, or, within three months after such construction hereafter, or before such construction, within six months after any part of such section or lot of land has been taken possession of

by the company for the purpose of constructing a railway thereon (and in the last case, after the company has been so required in writing by the occupant thereof), fences shall be erected and maintained over such section or lot of land, on each side of the railway, of the height and strength of an ordinary division fence, with openings or gates or bars, or sliding or hurdle gates with proper fastenings therein at farm crossings of the railway, and also cattle guards at all highway crossings, suitable and sufficient to prevent cattle and animals from getting on the railway: but this clause shall not be interpreted to the profit of any proprietor or tenant in any case where the proprietor of any such section or lot shall have accepted compensation from the company for dispensing with the erection of such gates or bars."

And the second sub-section or division declared that, "If after the expiry of such delay, such fences, gates and cattle guards are not duly made, and until they are so made, and afterwards, if they are not duly maintained, the company shall be liable for all damages which shall be done on the railway by their trains or engines to the cattle, horses, or other animals of the occupant of the land in respect of which such fences, gates or guards have not been made or maintained, as the case may be, in conformity herewith."

The obligation to fence is thus made to depend upon the fact of some part of the section or lot with respect to which it is asserted being occupied, and the great question is what that word occupied means—what is the land which the company is bound to fence by reason of occupation, and who are the occupants who may claim compensation if their cattle stray from unfenced land and get killed by the company's trains?

The section cannot be said to stand out from the mass of our statute law as a specimen of distinct and unambiguous legislation.

When it declares that if a railway is constructed on any section or lot of land *any part* of which is occupied, fences shall be erected and maintained *over such section or lot of land* on each side of the railway, does it mean that the occupation of any portion, say an acre or two at the distance of a mile from the railway, shall create the duty to

fence along the whole line where it crosses the section or lot, on pain of having to pay for damage to the cattle of the occupant of the remote acre who has no right to the land which adjoins the railway land? Or, to put what may seem a less extreme case; suppose two persons, one owning and occupying the east half of a section and the other owning the west half, but not occupying it. Can the occupant of the east half compel the company to fence the west half? and can he do so even though the owner of the west half expressly agrees with the company that his half need not be fenced?

The language of the section seems at first sight to leave room for contending that in cases like these the duty arises to fence all across the section or lot, with consequent liability in case the cattle of the occupant of one part pass from the other part on to the track and are injured.

It is clear, however, that to adhere critically to the literal reading of the clause would not be an infallible mode of ascertaining the intention of the legislature.

Amongst other instances of want of careful attention to the structure of the section, it will be noticed that cattle guards, which are required at road crossings only, are spoken of near the end of the second part, along with fences and gates, as made in respect of occupied lands: according to the literal reading of the first part the company may have to fence on each side of the railway before the railway is constructed: there is no obligation to fence between the railway and an adjoining lot when the railway happens to run along the boundary of the lot but takes no part of the lot: and there is no provision for fencing in a case where the railway was built before the passing of the act, across a section or lot that remained unoccupied until more than three months after the passing of the act.

It is evident that we must take the section as a whole, and construe it in view of the object and policy of the statute without too rigid adherence to forms of expression.

The necessity for fences along the railway and the object

of the statute in requiring them are, of course, to keep cattle from getting on the track from the adjoining land. Under all former statutes the company was bound to fence the whole line, though under the Dominion legislation that obligation did not attach without the request of the adjoining proprietor. It apparently came to be considered that when lands were unoccupied an unnecessary burden was thus cast upon the company; and one can easily perceive how onerous that burden might be in the case of a railway traversing, as the defendants' railway does, a vast tract of unsettled country, if the owners of wild lands, for example a colonization company, should require the fencing to be done, &c. For this reason, as one may reasonably conjecture, the obligation to fence was, under the new form of the Act, made only co-extensive with the actual settlement of the lands by occupation.

The occupation contemplated must, as I take it, be the occupation of land adjoining the railway. The fence was to be between the railway land and the land of the occupant. The policy of the law found expression in words in the Act of 1879 which spoke of the request *by the proprietors of the adjoining lands*. That policy was changed by detaching the right from mere ownership without occupation, but there is no evidence of a change so great and so uncalled for as to extend the right to either owner or occupant of lands that did not adjoin the railway.

My opinion, therefore, is that the occupant dealt with by section 16, is the occupant of the lands adjoining the railway; and that when the case is spoken of "a railway constructed on any section or lot of land, any part of which is occupied," we are to understand the reference to be the occupation of the part adjoining the railway. I do not now discuss the character of the necessary occupation. I assume that a person who has a right to take possession of a section or lot or other defined tract of land, and who actually settles on any part of it for the purpose of using the whole as occasion may require, as a

farmer does when he buys an uncleared farm and goes into possession, must for the purpose of this enactment, be regarded as occupying it all, although at the moment he may have occasion, or may be able, to actually use only a portion of it. The man who, under the act of 1879, had the rights of an adjoining proprietor will, as I assume, have, with respect to the whole of his section or lot, all the rights now given to an occupant, in case, in the familiar words of another statute, R. S. O. ch. 108, sec. 5, sub-sec. 4: "he shall have taken actual possession by residing upon or cultivating some portion thereof."

I say nothing at present of what may be the rights of a person who may actually occupy up to the line of the railway, but who has no title of any kind to the land.

Then taking the lands in respect of which fences are to be made to be only occupied lands adjoining the railway, let us see if the fair or necessary construction of the section gives the right to such an occupant of a part of a lot to require, in respect of that part, the fencing of the railway line across those other parts of the lot which he neither owns nor occupies.

No intelligible reason for such a law can be given. If by ingenuity any purpose can be suggested for the extension of the rights of an occupant beyond the limits of his title or possession, there is no reason for making them co-terminous with the section or lot of which he happens to hold a portion, but to the rest of which he is as much a stranger as he is to the next lot. The surveyor's lines are arbitrary limits which do not concern him.

The argument for the extension rests on the phrase "fences shall be erected and maintained *over such section or lot of land* on each side of the railway."

That argument, in the absence of any intelligible principle to support it, can only be maintained by insisting on a rigidly literal reading of the words "over such section," &c., which a little attention to the immediate context will shew to be out of place.

The section provides for three positions: *first*, where the

railway was constructed before the passing of the act; *second*, where it is constructed after the passing of the act; *third*, where it has not been constructed, but land has been taken for the purpose of constructing the railway thereon.

The first is that which exists in the present case; but inasmuch as the phrase containing the words "over such section," &c., applies to all three, we must construe those words in the light of all that goes before them.

In the first two positions the literal reading is, that when the railway is constructed on any section or lot, part of which is occupied, it is to be fenced over the section or lot. The question is, do these last words mean more than that it is to be fenced along the occupied part? The words "over the section or lot," though appropriate enough to fencing from one extremity of the lot to the other, are not the most apt words to express that meaning. It would have been better expressed by "across the section," or "over the whole extent of the section," or better still by saying in so many words that the whole was to be fenced although only a part was occupied; and one cannot avoid feeling that, if so anomalous a provision was intended, it would have been so expressed as to leave no room for dispute.

But when we read the terms in which the third position is stated, it is manifest that the language is not chosen with careful regard to the distinction between a whole section or lot as defined in the original survey and the occupied part. The words are "within six months after any part of such section or lot of land has been taken possession of by the company for the purpose of constructing a railway thereon, (and in the last case after the company has been so required in writing by the occupant thereof) fences shall be erected and maintained over such section," &c. Now what is meant by *occupant thereof*? Certainly not the occupant of the part taken possession of by the company, for the company is the only occupant of that part. Literally it means the occupant of the section or lot, and excludes the occupant of any part less than the whole; and

the result of this critically literal reading would be that the company taking part of a section or lot, would escape the obligation to fence opposite or *over* the lands of an adjoining occupant, unless he happened to occupy the whole section or lot.

A construction leading to that result would never be thought of unless the language of the statute compelled it, and the literal reading would be without hesitation modified by the evident intention. But we have in this the counterpart of the enactment more immediately before us, and applying the same rule of interpretation, I do not think we should hesitate to hold that the obligation to fence extends only to or *over* the occupied land.

This is pretty strongly enforced by considering the consequence of a different conclusion. If occupation of a part gave the right to demand that the whole should be fenced, we have the extravagant consequence, already glanced at, that the occupant of part could insist on the company fencing the land of another person, though the owner did not wish it fenced, or even released the company from the obligation to fence it.

These conclusions are sufficient for the disposal of this action. The plaintiff was, at the time of the accident, in actual occupation of part of lot 29. The horses escaped from that lot on to the track, but not from the part of the lot which the plaintiff occupied, or which, as against the plaintiff, the company was bound to fence.

It becomes unnecessary to decide whether mere occupation without title casts the obligation to fence upon the railway company ; yet it might not be improper to express our opinion of that subject, particularly as there was a difference of opinion upon it in the court below, were it not that it is more directly raised in another case in which we have now to give judgment. (a)

The appeal should be dismissed.

(a) *Davis v. Canadian Pacific R. W. Co.*, post 724.

OSLER, J. A.—The plaintiff alleges that she was the occupant of land in respect of which fences had not been made in conformity with the act. It is only in that character that she is entitled to recover, and the question is: Who is an occupant, or what land is required to be fenced within the meaning of the substituted sec. 16 of the act of 1883? For the plaintiff it is contended that the benefit of the clause may be invoked by a mere intruder or trespasser whose *possessio pedis* or actual occupancy of even an acre in any part of an original section or lot on which the railway is constructed, casts upon the company the obligation to fence on each side of the railway over the whole of the section or lot on which she has thus squatted. The defendants on the other hand argue that the object of the amendment was rather to protect the proprietor-in-occupancy, if I may use the expression, as distinguished from the non-resident proprietor, by making actual occupancy by or for the proprietor the test of the company's liability to fence, instead of leaving it to arise, as under the Act of 1879, upon the request of the proprietors of the adjoining lands whether in actual occupancy or not.

The section is obscurely worded, but I think the latter is the true construction.

In the absence of any statutory provision to the contrary, a railway company is under no obligation to fence its track. As a general rule, however, railway acts contain enactments more or less stringent requiring them to do so; but unless the duty created by the acts is general, and the obligation imposed unlimited and unqualified, it is only the owners of adjoining lands, and those in privity with them, who can take advantage of it, and the company are not bound to make good damage to cattle which were trespassing upon land which, when they escaped upon the track, ought, as between the land owner and the company, to have been fenced: *Kickett's Case*, 12 C. B. 160; *Fawcett v. York and Midland R. W. Co.*, 16 Q. B. 610; *Douglass v. Grand Trunk R. W. Co.*, 5 A. R. 585.

How far, then, and in favor of whom, has the enactment

in question altered the defendants' common law liability, and that which was cast upon them by the repealed section? By the latter they were bound to fence only if *required* to do so by the proprietors of the adjoining lands. The new section does not impose upon them the duty of fencing their track generally, or any part of it as against all the world, but only on the particular lot or section any part of which is occupied.

I think we must hold that the partial occupation refers to a claim or under a title to the whole lot or section, or to some distinct sub-division thereof. If the cattle of an occupant of part of one lot or section while trespassing upon an adjoining lot or section, escape thence upon the railway and are killed, it must be conceded that the owner would have no claim against the company. Plainly, the clause contains no indication of an intention to protect the cattle of everybody in general. And what reason can be suggested for supposing that Parliament meant to apply a different rule if the owner of the animals be even proprietor-in-occupancy of—much less if he be a mere trespasser upon—a part of a lot through which the railway passes, but is neither proprietor nor occupant of, nor claims any interest in another part of the same lot, from which they escape on to the railway?

If the construction which the plaintiff contends for is sound, the owner or occupant of a single acre at one end of a lot, not adjoining the railway, would be entitled to recover, though the whole of the rest of the lot belonged to and was in the occupation of another person, provided only his cattle escaped upon the railway through some defect in the fence between the railway and the land of that person, though he would be remediless if they got there through the next adjoining or any other lot whether occupied or not. This consideration makes me hesitate to agree to the argument of my brother O'Connor in the court below, as to the supposed policy of the legislature being the protection of settlers, whether intruders, trespassers or others, for the cattle would have been trespassing in either case I

have supposed, and why should the owner not have been protected in both ? I think he would be protected in neither, because in neither would he be the occupant of land which as to him the company were bound to fence.

I think the object of the act was to relieve the landowner (to use a general term) from the duty of requiring the company to fence, and the company from the duty of fencing where the landowner was not also an occupant.

As the company, when bound to fence at all, are bound to fence "over the section or lot" on each side of the railway, the partial occupation which throws that duty upon them must, I consider, be that of the owner, proprietor, or tenant of the whole, or of some one in privity with him.

I do not mean to decide that the words "section or lot" refer only to sections and lots laid down in the original survey.

They may properly be held to include any sub-division thereof which adjoins the railway.

And it is unnecessary in this case to decide whether the plaintiff was an owner, proprietor, or tenant of the few acres of which she was in actual occupation, as her horses escaped upon the railway from another part of the lot which was neither occupied nor claimed by her, and which, therefore, for the reasons I have mentioned the defendants were under no obligation to fence.

Appeal dismissed, with costs.

DAVIS V. CANADIAN PACIFIC RAILWAY.

Consolidated Railway Act, 1879—Occupied land—Occupant—Crown locatee—Fencing by Railway Company—Contributory Negligence.

The plaintiff and one Nadeau, occupied adjoining lots on the line of the defendants' railway; Nadeau as the locatee of the Crown, plaintiff as a squatter and by agreement between them it was arranged that their horses should pasture together. One of plaintiff's horses strayed from Nadeau's lot on to the track of the defendants which at that point was unfenced—and was killed by a passing train. In an action for the value of the horse it was :

Held that "occupied lands" under the Railway Act 46 Vict. ch. 24 (D.) denote lands adjoining a railway and actually or constructively occupied up to the line of the railway by reason of actual occupation of some part of the section or lot by the person who owns it or is entitled to possession of the whole, and that although mere occupation such as that of a squatter is not provided for in the act, N. was, under the circumstances, entitled to require the defendants to fence, notwithstanding he had omitted to fulfil the conditions of his location by performance of the settlement duties required thereby—the Crown never having taken steps to cancel such location; that under the circumstances the question as to contributory negligence did not arise, and therefore plaintiff was entitled to recover.

THIS was an appeal from a judgment of the County Court of the County of Renfrew, making absolute a rule *nisi* to set aside a verdict rendered in favor of the plaintiff and for a new trial with costs to abide the event.

The facts briefly stated were, that one John Nadeau had been located for lot No. 10 in range or concession A of the township of Papineau, in the temporary judicial district of Nipissing as locatee of the Crown, while at the same time the plaintiff was in occupation of part of the adjoining lot, No. 11 in the same concession, of which he had taken possession and squatted upon.

Nadeau it appeared had been located for lot 10 in 1882 by the Crown Lands Agent at Pembroke, and his name entered in the agent's book opposite the lot, and upon receipt of the usual affidavit the agent returned him to the Department as located for this lot. No license of occupation was issued and nothing further was done beyond filing the return in the Crown Lands Department.

A portion of Nadeau's lot was comprised of a beaver meadow of about twenty acres, from which he had been in

the habit of making hay for several years; and he had been working on the lot for about thirteen years, but the settlement duties required by R. S. O. ch. 24, to be performed had never been fulfilled; it was shewn, however, in evidence, that the Department did not take advantage of a forfeiture for non-performance of settlement duties unless other persons made application for the lot, and no such application was shewn to have been made in this instance.

In or about 1879 plaintiff agreed with Nadeau that his and plaintiff's horses might pasture together there being no water on plaintiff's lot; and the horses had since run together until on or about the 11th of August, 1884, when one of the plaintiff's horses strayed from Nadeau's lot on to the track of the defendants where it was run over by a passing train and killed.

The defendants claimed that Nadeau was not an "occupant" in whose interest they were required to fence: and the plaintiff though he resided on lot eleven adjoining Nadeau's lot, only occupied a small portion thereof without title, remote from the railway.

At the trial the jury found in favor of the plaintiff and judgment was directed to be entered for \$125 and costs.

Against this verdict and judgment the defendants moved in the July term and in September following the order was made absolute.

Thereupon the plaintiff appealed to this court and the appeal came on to be heard on the 20th November, 1885.*

Aylesworth, for the appellant.

H. Cameron, Q.C., and *W. R. White*, for the respondents.

The other facts of the case and the points relied on appear in the judgments.

February 10, 1886. PATTERSON, J. A.—The order for a new trial was made only because the jury had omitted to answer fully one of the questions submitted by the learned

* *Present*.—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

judge. There were, in fact, two questions put as one, and the jury's answer did not specifically answer both. The question and answer were as follows :

" 1. Was Nadeau, mentioned in the evidence, the occupant of lot No. 10, in Range A, in Township No. 3 of Nipissing, on the 11th August, 1884—or of any of it ; and did the horse sued for escape from such occupation ? Answer.—We unanimously agree that he is occupant of the whole lot."

The last half of the question not being specifically answered, and there being no distinct finding that the plaintiff's horse passed from Nadeau's lot to the railway, the learned judge, whose attention had not been called at the trial to the necessity for any further findings of fact, acted in granting the new trial on the idea, first suggested to him on the argument of the order *nisi*, that the verdict could not be supported without an express finding that it was from Nadeau's lot that the horse escaped.

I cannot say that I share his scruples.

Taking the whole of the question as we find it, relating as it does to Nadeau's occupation of the lot, and having regard to the fact that this second part was not put as a separate question ; and, further, keeping in view the language, "did the horse escape from such occupation ?" it strikes me that the object was, and must have been so understood by the jury, not to ask did the horse escape from lot 10, which nobody questioned, but did he escape from a part of the lot which was occupied by Nadeau ; and this was fully covered by the answer that he occupied the whole lot.

There was evidence that the horse did escape from Nadeau's lot by way of the Portage road. Nadeau and the plaintiff both swore to following the horse's tracks by that road, and to the impossibility of the horse getting from the adjoining lot 11 on which Davis lived on to the railway, by reason of a deep rock cutting. After the accident, when Davis and Nadeau were interviewed by Hackett on behalf of the company, all parties understood that it was from Nadeau's lot the horse escaped, and the point then talked of was the right of Davis to have his horse on Nadeau's lot.

Take with this the absence of any attempt to suggest at the trial any other way by which it was probable or possible that the horse could have reached the railway, and the further fact that no objection was taken to the want of the finding now insisted on, and the conclusion is obvious that it would have been nothing but a matter of form to ask the jury where the horse got on the railway, and that all parties so understood it and tacitly agreed to dispense with the formal finding. It is further noticeable that the frame of all the other questions put to the jury, and the answers, all assume the fact that the horse passed down the Portage road.

I therefore think that a new trial was unnecessary, and that the plaintiff is entitled to hold his verdict if the company was bound to fence as against Nadeau.

I have referred in the judgment just delivered in *Conway v. Canadian Pacific R. W. Co. ante*, p. 708, to the law under the Railway Acts of 1868 and 1879, which required the railway company to fence all along the line at the request of the proprietors of the adjoining lands, and to the two respects in which that law is altered by the present Act 46 Vict. ch. 24 (D.), viz., confining the obligation to fence, to sections or lots, some part of which is occupied, and making the duty no longer depend on the request of either proprietor or occupant; and I have expressed my opinion that the land intended to be denoted as occupied land is land adjoining the railway, and either actually occupied up to the railway line, or constructively occupied by reason of the actual occupation of some part of the section, lot or smaller tract by the person who owns or is entitled to the possession of the whole. I am not able to assent to the view very ably put by Mr. Justice O'Connor in his judgment in *Conway's Case*, that a mere squatter who has no title whatever can, by virtue of his actual possession of land alongside of the railway, enforce against the company the statutory duty to fence over the land he occupies. It may be, as he says, that the practice in the Crown Lands Department is to recognize actual possession as giving

some indefinite claim to consideration, and we have evidence in this case that before the plaintiff could be located for his lot, he was required to obtain releases from two intruders who were living on it; but we have no sufficient reason for assuming that the Dominion Parliament, in this general act respecting railways, meant to create rights as against railway companies in persons who, under the laws of the provinces where the lands lay, would not be recognized either as owner or as holding in privity with the owner of the lands, whether the owner happened to be the Crown or a private person.

I take the object and policy of this modification of the law to be to lessen and not to add to the obligation to fence.

I find some positive support for this construction in the provisions of the new section 16. The duty to the occupant, whoever he is, is to fence over the lot, and also to make gates or openings at farm crossings of the road. But the section declares that it is not to be interpreted to the profit of any proprietor or tenant in any case where the proprietor of any section or lot shall have accepted compensation from the company for dispensing with the erection of the gates or bars: that is to say a man shall not insist on having gates or bars after having been compensated for doing without them. But if the proprietor is by his own contract disabled from claiming performance of that part of the statutory duty, can it be intended that a squatter on the lot, not claiming under the proprietor, shall have a right to insist on its performance for his convenience or benefit? The extravagance of this result illustrates pretty well the untenable character of the contention that mere occupation, apart from right to occupy, is contemplated by the statute.

No question arises in this action concerning the defendants' duty to fence the lot on which the plaintiff lives, which is lot eleven in concession A., because the horse did not pass directly from that lot to the railway. The plaintiff does not occupy the lot, but only occupies, without

title, a small part of it remote from the railway. There would be no duty on the company to fence across the lot by reason of that occupation; and it seems that the case of lots like this, upon which the railway was built before the passing of the act of 1883, but which are not yet occupied, has been overlooked in drafting the section 16 which makes no direct provision for fencing the line over them when they become occupied lots. This is one of several particulars in which the section requires legislative revision.

We have to deal with Nadeau's right to be treated, for the purpose of the statute, as occupant of lot 10 in concession A.

He applied in April, 1882, under the Free Grants and Homesteads Act, R. S. O. ch. 24, for lot 10, and made the affidavit required by section 7 of that act, and was entered as located for the lot by the Crown Land Agent at Pembroke, and so included in the agent's return to the Crown Land Office at Toronto. He said he had begun clearing on the lot several years before that, and has cleared every year since, not saying how much. He has a part, remote from the railway, fenced. He further says that there are 20 acres drained, all meadow, and that he has had nothing but hay on the land for the last four years. He has never lived on the lot, and has never had a house on it, being unmarried and living with his sister on lot 8.

Was the company bound, as against Nadeau, to fence over lot ten within three months after 25th May, 1883?

The argument against his right to insist on the benefit of the statute is that he never performed his settlement duties prescribed by section 8 of the act.

Section 9 enacts that on failure in performance of the settlement duties the location shall be forfeited, and all rights of the locatee, or of any one claiming under him in the land, shall cease.

The duties, in addition to clearing and cultivating at least two acres annually during the five years next after the date of the location, are that he "shall have built a house

thereon fit for habitation, at least sixteen feet by twenty feet, and have actually and continuously resided upon and cultivated the said land for the term of five years next succeeding the date of such location and from thence up to the issue of the patent, except that the locatee shall be allowed one month from the date of the location to enter upon and occupy the land, and that absence from the said land for in all not more than six months in any one year (to be computed from the date of the location) shall not be held to be a cessation of such residence, provided such land be cultivated as aforesaid."

No one of these duties, building, residence or cultivation, has been performed by Nadeau.

Under these circumstances I have not been able to come to the conclusion that he can properly be held to be an occupant entitled to have the lot fenced over by the railway company without hesitation, but that is the conclusion at which I have arrived.

My reasons are the same which I understand to have prevailed with the learned judge in the court below; and though they may possibly seem not entirely conclusive, yet having to interpret a statute which leaves so much of its meaning unexpressed, as this section 16 does, we must leave it to the legislature to deal with the matter if we do not happen to hit its real intention.

The learned judge in the court below noticed the fact that Nadeau had not received a license of occupation. I agree with him that that circumstance does not affect the present question. I do not think the existence of a license would in any respect strengthen the case.

The power is given by the Public Lands Act, R. S. O. ch. 23, sect. 15, to the Commissioner of Crown Lands to issue a license of occupation to (amongst others) a person who has been located on any public lands as a free grant; and that section declares that the holder of the license "may take possession of and occupy the land therein comprised, subject to the conditions of such license, and may thereunder, unless the same has been revoked or cancelled,

maintain suits in law or equity against any wrongdoer or trespasser, as effectually as he could do under a patent from the Crown."

Now it is clear from the provisions of the Free Grants and Homesteads Act, some of which I have quoted, and from another section of the Public Lands Act to which I have to refer again, as well as from this section which speaks of the person being "located on the land" as a free grant as a condition precedent to his right to the license of occupation, that the right to occupy a free grant lot is incident to being locatee of the lot, and does depend on the document called the license of occupation. That document has the effect of enabling the holder to bring actions, just as a patentee might do, against trespassers, by virtue of his constructive possession when he is not in actual occupation of the land, and even though the trespasser was in possession before the license issued, *Greenlaw v. Fraser*, 24 C. P. 230. That right, however, is immaterial to our present purpose, because the locatee can have no right to the railway fence unless he is in occupation; and if he is in occupation as locatee he has a right at common law to maintain a possessory action, and does not require the aid of the statutory effect given to the license of occupation, *Henderson v. McLean*, 16 U. C. R. 630; *Glover v. Walker*, 5 C. P. 478; *Alexander v. Bird*, 8 C. P. 539; *Harper v. Charlesworth*, 4 B. & C. 574.

Nadeau must be held to have taken actual possession of the lot as locatee by clearing, fencing, and mowing the hay, and doing whatever acts he did upon the lot after he was entered as locatee. The evidence is that he did such acts; and it is obvious that actual possession must be taken by entry upon a free grant lot before it is possible to do any of the specific settlement duties which the statute prescribes.

Under the Railway Act of 1879 he would have been entitled, as soon as located for the lot, to call upon the company to fence it. He would have been "proprietor" within the meaning of the Act as I understand it. It follows that when to that proprietorship he added the

actual occupation of any part of the lot, the lot became within the terms of the present section 16, a lot some part of which was occupied, and the duty to fence over it arose, provided it was still an occupied lot at the passing of the Act of 1883.

This brings us to the point at which the chief room for hesitation exists.

If Nadeau had, three months after the passing of the Act, which time was more than a year after he became locatee, taken proceedings to compel the company to fence over the lot, could he have maintained that he then occupied the lot as locatee, when he had not fulfilled a single condition of his location? Was he not, under the effect of section nine of the Free Grants and Homesteads Act, a man all whose rights as locatee had ceased, and who was therefore unable to assert that his actual possession which embraced the meadow, could be extended by construction to the unoccupied land adjoining the railway?

I have had serious doubts on this point, but I am now of opinion that we must apply to section nine the rule that applies in ordinary cases of landlord and tenant, and treat the locatee who remains in possession after condition broken, as still in possession as locatee, until something is done on the part of the Crown by way of insisting on the forfeiture.

This reading of section nine is indicated by section 22 of the Public Lands Act, and the two acts are to be read as one. Section 22 provides that if the Commissioner of Crown Lands is satisfied that any purchaser, grantee, locatee, or lessee of any public land * * has violated any of the conditions of sale, grant, location, or lease, or of the license of occupation, * * he may cancel such sale, grant, location, lease, or license, and resume the land therein mentioned, &c.

Nadeau's location has not been cancelled, but he has been left in such possession as he had of the lot, and the result is that he must be treated as occupying by leave of the Crown and not as an intruder. The fence is therefore

called for by the terms of the statute, the lot being in some part of it, occupied ; and, because the possession of the whole being lawful, the tenant cannot fully enjoy it unless the land is fenced off from the railway.

The question of contributory negligence which is raised on the part of the company is out of place in the face of the express terms of section 16, which throw upon the company the liability for all damage to horses, &c., done by the engines or trains until the fences which ought to be built have been built.

The plaintiff, who is the appellant, succeeds on all the points. The appeal should, therefore, be allowed with costs, and the rule in the court below discharged with costs.

OSLER, J.A.—The only ground on which the learned judge in the court below set aside the verdict and judgment and granted a new trial was that the jury had not expressly answered the whole of the first question submitted to them, viz., “ Was Nadeau the occupant of lot ten in range A, township No. 3 of Nippissing, on the 11th of August, 1884, or of any part of it, and did the horse sued for escape from such occupation ? ”

The answer was “ we unanimously agree that he is the occupant of the whole lot.”

The jury took no notice of the latter part of the question so that there is no express finding as to it.

If the learned judge was not prepared to set aside the judgment on any of the other grounds urged before him, my impression is that he was not bound to interfere and should not have interfered with it on this. The question appears to have been submitted more as a matter of form than as one about which there was any doubt. The evidence is all one way and at the trial it was assumed that the horse escaped from Nadeau's land, and the only matter in contest on that point was whether there was any bargain or assent between Davis and Nadeau under which it had a right to be there.

Davis said : " The horse came off Nadeau's lot on to the track."

Nadeau said : " It is a deep rock cut across Davis' lot. No animal could get off his land on to the railway line. A horse let out on Davis' pasture would come over on to my pasture and then along that old Portage road and reach the railway line."

At the close of the plaintiff's case, the argument on motion for non-suit all proceeded on the assumption that it was proved that the horse strayed from Nadeau's land. The evidence given for the defence assumed it too and was entirely directed to the question of the bargain between Davis and Nadeau about the pasture and Davis' right to let his horse run on Nadeau's lot. One of the witnesses on examination in chief gave evidence of a conversation between Davis and another witness, Hackett, and of the account given by the former of where his horse was killed.

And the second and third questions submitted to the jury assume as a fact proved in the case that the horse strayed on the railway from Nadeau's lot.

I think, considering the course thus taken at the trial, that if the defendants attached any importance to having the question fully discussed by the jury, it was the duty of their counsel, quite as much as of the plaintiff's counsel, to have called the judge's attention to it at the time, and that they cannot, after judgment has been given, object that the fact was not proved, when it was treated at the trial and acted upon by the judge in directing judgment, as one which had been proved. If, therefore, the appeal turned on this point I should be for allowing it. We have, however, to determine the further question, whether Nadeau was an occupant against whom the company were bound to fence. Such an occupant must be one who is, or is in privity with, the owner, proprietor, or tenant of the land.

Nadeau was not the owner or the tenant. Can he fairly be described as the proprietor? It is a term which ought not to receive a strict construction. It was used in

the Railway Act, C. S. C. ch. 66, sec. 13, in which Act the word "owner" had by the interpretation clause the same meaning as it has by the interpretation clause of the Act of 1879. In *Brown v. The Grand Trunk Ry. Co.*, 24 U. C. R. 350, 354, Draper, C. J., speaking of the former Act, says: "The word owner is declared by the interpretation clause to mean any corporation or person who could be enabled to sell and convey lands to the company. The word 'proprietors' must have another and we think a less extensive meaning and may be construed possessors having some right in the land."

Whether the term admits of a wider meaning and is capable of including one who is a disseisor or one who has no other interest than possession which if undisturbed would ripen into a statutory title by possession need not here be decided. Nadeau had been located for lot No 10 in Sept. 1882, by the local Crown Lands Agent on making the affidavit required by 43 Vict. ch. 4 sec. 1. (O.) amending sec. 7 of the Free Grant Act, R. S. O. ch. 24. The agent said he had entered his name in his book, opposite the lot on receiving the affidavit and had returned him as being located therefor in his returns to the Crown Lands Department. This was all that was done and was the only way of locating any one throughout the free grant District.

It appeared that the settlement duties required by the Act had not been performed as regards actual residence, though about twenty acres had been cleared and cultivated, and Nadeau had been working on the lot for thirteen years.

The Crown Land Agent said that the location was conditional in this, that if the man did not go on and do the settlement duties, the location would be forfeited, but the department did not take advantage of this forfeiture unless somebody else applied for the land.

I think Nadeau was cultivating and using the lot in such a way as to justify the finding of the jury that he was in possession of or occupying it, in fact, though not actually residing upon it, and he was doing so as locatee

with the assent and concurrence of the Crown, though he had not complied with the conditions on which alone he would have been entitled to obtain a patent, and the Crown might have taken advantage of the forfeiture and dispossessed him. According to the well-known case of *Harper v. Charlesworth*, 4 B. & C. 574, 591.

“The actual possession of Crown land with the assent of the Crown is sufficient to entitle the party possessing it to maintain trespass against persons having no title at all, and who are mere wrong-doers.”

The defendants therefore cannot urge that Nadeau was a mere trespasser or intruder upon the lot, since he was there with at least the assent of the Crown, and no one but the Crown had a better title. Yet I apprehend that something more than a mere possession would be necessary, the company not being bound to fence as against the Crown, and therefore Nadeau's occupation could not be treated as an occupation by or with the license or consent of a proprietor or owner against whom they were so bound. I think we may, however, hold that he was a possessor with some kind of right or title, and therefore a proprietor within the meaning of the Act, as his possession, though originally wrongful, afterwards became, and is still referable to his location or agreement with the Crown. The Public Lands Act is to be read as part of the Free Grant Act, and therefore if the Crown has not taken proceedings under the former Act to recover possession, or in some other way manifested an intention no longer to consider Nadeau as locatee, I think the defendants cannot set up as against him an alleged ground of forfeiture, of which the Crown had not chosen to take advantage any more than they could set up the right of his landlord, had he been a tenant, to re-enter for condition broken.

I agree with the learned Judge below on this point, and think he may properly be held, so far as the railway and the rest of the world are concerned, to be an occupant of the lot under some right or claim of title to it, and therefore as the plaintiff's horse was lawfully there when it

escaped from thence upon the railway, that he is entitled to recover.

It was argued that the plaintiff had been guilty of contributory negligence in turning his horse into an unfenced field whence it would naturally stray upon the railway track by means of the Portage road which led down to it. I should not, under all the circumstances, be disposed to disturb the finding of the jury in the plaintiff's favor on this point.

As at present advised, my opinion is that where the proximate cause of the damage is the omission of the company to make or maintain the fences as required by the statute, the question of contributory negligence in turning the animal into a field not fenced off from the railway, would not arise. The plaintiff had the right to use the field, and the duty to fence as against him being absolute, I cannot see that he would owe any legal duty to them to keep his animal from the railway track. The question is very well considered in *Mead v. The Burlington & Lamoille R. W. Co.*, 52 Vermont Sup. Court, 278.

I think the appeal should be allowed.

HAGARTY, C. J. O.—I agree in the result. I wish to guard myself from expressing an opinion on any point not absolutely necessary for the decision.

The statute is so worded as to raise and also to suggest many serious difficulties, and we may express a hope that it may be amended so as to remove ambiguity as to what is meant by occupant and proprietor or owner.

Nadeau in my opinion must be considered as occupying the lot under the Crown as described in the judgments just delivered and not as a trespasser or intruder on Crown Lands.

I think the defendants have no right to raise any question as to his alleged non-observance of certain requirements of the Free Grants Act.

BURTON, J.A., concurred.

Appeal allowed, with costs.

BALL ET AL. V. CROMPTON CORSET COMPANY ET AL.

Patent of invention—Mechanical equivalent—Coiled wire spring—India rubber spring.

The plaintiffs, the holders of a patent for "an elastic gore, gusset, or section * * springs arranged in groups and made of a continuous length of coiled wire," sought to restrain the defendants from using a colorable evasion of this patent in the manufacture of corsets.

Held, [affirming the judgment of the court below] that the substitution of coiled wire springs for india rubber springs, which had been previously used, was a mere mechanical equivalent for the rubber springs, and therefore not a subject for a patent.

THIS was an appeal by the plaintiffs from a judgment of Proudfoot, J., reported 9 O. R. 228, where the facts and the points involved in the case are clearly stated; and came on to be heard before this court on the 26th and 27th of November, 1885.*

W. Cassels, Q.C., and Akers, for the appellants.

MacLennan, Q.C., and Osler, Q.C., for the respondents.

February 10, 1886. HAGARTY, C. J. O.—I find myself unable to point out any error in my learned brother Proudfoot's judgment, to warrant our interfering in favor of the plaintiffs. I have examined the case with the greater amount of care, because I am conscious of my inability to satisfy myself that many claims for so-called "inventions," brought before our courts, are properly within the legitimate scope of our patent law so as to warrant the grant of a monopoly of manufacture or user. My individual opinions on such a subject are of little value, as I have to be governed by what has been authoritatively declared to be the law by its lawful expounders.

It would be a waste of time and labor to repeat the grounds stated by the learned judge as the basis of his conclusions. The coiled elastic metal spring has been long before plaintiffs' patent, used in corsets—in short separate lengths. The continuous spring made of India rubber had

* *Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

been patented before plaintiffs' patent. If plaintiffs rely on the substitution of continuous for separate springs they have been anticipated by the Miller patent, and the best that can be said for the claim is that it adopts the same material as was used in the disconnected metal springs, and the continuous principle of the India rubber spring. I am wholly unable to see how the different arrangement of the old material under the already known continuous principle, can fall within the statutable definition: "Any new and useful art, machine, manufacture or composition of matter, or any new or useful improvement on any art, machine, manufacture or composition of matter not known or used by others before his invention."

The plaintiffs seem driven to rest their case as they put it in paragraph 10 of their reasons of appeal: "It is fallacious to find that the spiral metal spring is an equivalent for the India rubber. The great object to be obtained was the substitution of spiral metal springs for rubber—that was stated to be the object sought to be obtained."

It therefore stands as a mere substitution of one very well known material, for another equally well known material, to produce the same effect on the same principle in a more agreeable and useful manner.

If the continuous India rubber spring had never been patented, the plaintiffs' claim would rest simply on using the old coiled spring in a continuous instead of a disconnected form—in other words, instead of cutting off the springs into parallel lengths it is doubled round and carried parallel to the first line and then back in parallel lines. The coiled spring acts with the same elastic and expanding and contracting qualities, whether cut short in lengths or continuous. It is an improvement apparently in convenience and cheapness, but I find myself unable to grasp the idea that the improvement is a proper subject for a patent. It seems to me like the numerous daily improvements in manufacture of articles in ordinary use, for which the first adapter never dreams of asking for the monopoly in manufacture.

In *Hunter v. Carrick*, 10 A. R. 449, we were satisfied

that the plaintiff had, by the skilful adoption and rearrangement of well-known particulars, produced in the whole the best oven that had been heretofore in use, but it was pointed out how he failed to establish his right to a patent for the combination. It does not seem necessary to attempt an examination of the enormous number of authorities in the books. As the Lord Chancellor says, in *Penn v. Bibby*, L. R. 2 Ch. 135: "To this it was objected that the alleged invention was merely a new application of an old and well-known thing. It is very difficult to extract any principle from the various decisions on this subject which can be applied with certainty to every case, nor indeed is it easy to reconcile them with each other."

Sir George Jessel's remarks as to the citation of cases in the construction of a will may also be referred to. In our late case of *Hunter v. Carrick* we had occasion to consider this question of novelty, and the judgment of the Supreme Court in *Smith v. Goldie*, 9 S. C. R. 46, may be noticed.

In *Penn v. Bibby* the words of Sir A. Cockburn in *Harwood v. Great Northern Railway*, 2 B. & S. 708, are cited approvingly: "Although the authorities establish the proposition that the same means, apparatus or mechanical contrivance, cannot be applied to the same purpose so nearly cognate and similar as that the application of it in the one case naturally leads to the application of it when required in some other, still the question in every case is one of degree, whether the amount of affinity or similarity which exists between the two purposes is such that they are substantially the same, and that determines whether the invention is sufficiently meritorious to be deserving of a patent."

These words are spoken as approaching to the enunciation of a principle.

The question of the substitution of one material for another is discussed in *Curtis* 75, 4th ed.: "In the case of a manufacture or machine, the substitution of one material for another leading to greater cheapness or durability in the manufacture or machine itself, seems to belong to the province of construction and not to that of invention." He cites the judgment of United States Supreme Court, in *Hotchkiss v. Greenwood*, 10 Howard 266: "The improvement consists in the superiority of the material and which

is not new over that previously employed in making the knob, but this of itself can never be made the subject of a patent. No one will pretend that a machine made in whole or in part of materials better adapted to the purpose for which it is used, than the materials of which the old one is constructed, and for that reason better and cheaper, can be distinguished from the old one, or in the sense of the patent law, can entitle the manufacturer to a patent."

Several cases are suggested by Mr. Curtis in which the patent could be supported, when something more than a mere change of material was involved, pp. 67 to 78.

Penn v. Bibby, already cited, supported the patent on distinct grounds beyond the mere change of material.

The language quoted in our case of *Hunter v. Carrick*, p. 455, from Bump 56, is applicable here: "Mere change of form is not patentable because it involves no invention. It is simply the device of a mechanic. A structural change of form and proportion—although it improves the operation without changing the mode of operation and produces a better result, but of the same kind, is not patentable. If the change in form and location involves a functional difference beyond mere mechanical perfection and adjustment, and produces an improved product it is patentable."

A case cited for the appellants, *Heath v. Unwin*, 13 M. & W. 591, appears to me, at least in one aspect, rather against their contention. There, the plaintiff claims as his invention, "The use of carburet of manganese in any process for the conversion of iron into cast-steel."

Parke, B., says: "The specification is expressly for the employment of carburet of manganese, and the mode of using it is by putting a certain quantity by weight of that substance in an unmelted state into the crucible. * * * It is clear that the defendant has not directly infringed the plaintiff's patent, for he has never used that substance in the mode described in the specifications." The defendant had never used the carburet of manganese by putting any of it into the crucible. He placed the black oxide and carbonaceous matter in, and the two substances formed during the process of conversion and before actual union with the steel, carburet of manganese in a state of fusion.

He never meant to imitate plaintiff's process. That his process formed the carburet was clearly not an ascertained or well known fact.

Parke, B., says: "Then comes the question whether he has indirectly infringed the patent by imitating and using the same process, substitutionally to making a colorable variation. Now there is no doubt, we think, if the defendant substitutes for a part of the plaintiffs' invention some well known equivalent, whether chemical or mechanical, he would probably be considered as only making a colorable variation, but he has not done so." If the appellants here had been sued by Miller for infringing his patent of 1866 for the continuous spring, he would argue that the use of wire instead of rubber was a colorable imitation, using one well known mechanical equivalent for another. The appellants have to insist that a substitution of the wire for the rubber was the main idea of their patent (as in paragraph 10 of their reasons of appeal.)

Miller would urge that the idea of continuity of the spring was clearly taken from him, and that the metal coil was so well known as adaptable to this purpose that it had been long used in short lengths. That the Florsheim patent presented really nothing beyond uniting these separate pieces of spring at the ends, or in other words not cutting them off short. It appears to me that Miller's claim against the appellants for infringement would be at least as strong as their present claim against defendants. No new material is invented, no hitherto latent or unknown property of elasticity is developed, no new adjustment of material is exhibited. The alleged new material had long been used in the same manufacture. The alleged invention of continuity had been also long anticipated. I am unable to believe that the law sanctions the granting of monopoly for this. I believe the result is a cheaper and better article, just as the plaintiff in the oven case produced by his shrewdness the best oven, but I think the court below was right in its dismissal of the plaintiff's bill.

I do not propose to discuss the minor points as to elastic or inelastic margins, gussets, grouping, etc., etc.

Nor have I discussed the objection as to the first of plaintiff's patents in the United States being over twelve months issued before the Canadian patent, each (p. 73), as Florsheim states having or shewing the continuous spring. I think the appeal must be dismissed.

PATTERSON, J. A.—I agree that there is no patentable invention. The invention claimed is simply the use of a continuous spring in place of springs cut into lengths. That was the principle of the Miller patent. It is true that in that patent the continuous spring was described as a rubber spring, which may perhaps prevent the use of a continuous spring of other material being an infringement of that patent, but the invention of the continuous spring is nevertheless of earlier date than the plaintiff's patent. The plaintiffs merely apply the continuous principle, with a kind of spring already well known, though not a rubber spring.

BURTON, J. A.—I have arrived at the same conclusion, although, I must confess, with much regret. However, as I understand the case is to be carried further, it may be found that the views we entertain are not sustainable.

I have not the slightest doubt that the improvement made by the plaintiffs was of great value, and that thereby a vastly better article was introduced, and at a greatly reduced cost, and I regret that the effect of our decision is to enable the defendants to avail themselves of the plaintiffs' ingenuity and skill without compensation. It does not commend itself to one as a very honest proceeding, but if the patent is not valid, we are unable to aid the plaintiffs, and upon the best consideration I have been able to give the matter, I am unable to convince myself that it is.

OSLER, J. A., concurred with HAGARTY, C. J. O.

Appeal dismissed, with costs.

CONMEE v. CANADIAN PACIFIC RAILWAY COMPANY.

AND

THE CANADIAN PACIFIC RAILWAY COMPANY v. CONMEE.

Practice—Jury notice, striking out—Right to have cause tried by jury—Jurisdiction.

Conmee and McLennan became contractors for the construction of a section of the Canadian Pacific Railway. The agreement therefor stipulated that 90 per cent. of the work should be paid for during the progress thereof upon "the progress estimates" of the proper officer of the company, the remaining 10 per cent. to be paid on the completion of the contract, at which time the company alleged that they had discovered that by means of fraud the contractors had procured from their engineer progress estimates for sums greatly in excess of the work done and they claimed for overpayments about \$600,000.

The contractors, on the 5th of October, 1885, sued out process in the Queen's Bench Division to recover \$200,000, the balance claimed by them as still due; and on the 31st of the same month the company sued out process in the Chancery Division against the contractors to enforce payment of the amount claimed to have been overpaid them. Issue was joined in the actions respectively on the 17th and 14th of November following. In the action in the Chancery Division the contractors gave notice for trial by a jury which, on application by the company, was struck out by the master in Chambers who also made an order refusing a motion made by the contractors to stay proceedings in the Chancery Division action until the determination of the questions in the other action. Thereupon the contractors appealed, and on argument before Boyd, C., their appeal was dismissed.

The company moved for and obtained an order from the master in Chambers to stay all proceedings in the Queen's Bench Division action with liberty to the contractors to raise in the Chancery Division action by defence, set off, counter-claim, or otherwise, all questions intended to be raised by them in the Queen's Bench Division action against which order the contractors appealed to ROSE, J., who, feeling bound by the decision of BOYD, C., affirmed the order of the master.

Held [reversing these orders], that the Court of Appeal had jurisdiction to entertain the appeals, and that a trial with a jury was the *prima facie* right of the contractors whose action was the earlier one, and that the orders complained of were not such as rested in the mere discretion of the Judge. [Hagarty, C. J. O., *hesitante*.]

Per OSLER, J.A., even if the facts were such as would entitle the Judge at the trial to strike out the jury notice, the present orders were premature.

THIS was an appeal from a judgment of Boyd, C., affirming an order of the Master in Chambers, on the application of the railway company, the plaintiffs in the action in the Chancery Division, setting aside a motion for a jury given by the defendants therein; and a further order in the

same action dismissing the defendants' motion to stay the proceedings and to try the issues raised therein in an action in the Queen's Bench Division brought by Conmee and McLennan against the railway company.

At the same time an appeal was brought by the railway company from a Judgment of Rose, J., affirming an order of the Master in Chambers in the action in the Queen's Bench Division, made on the application of the company, staying the proceedings therein; and with liberty to the plaintiffs Conmee and McLennan to raise in the Chancery action by defence, counter claim or set off all questions intended to be raised by them in the Queen's Bench Division action.

Both appeals came on to be heard on the 25th and 26th of February, 1886.*

McCarthy, Q. C., and Wallace Nesbitt for Conmee et al.
Robinson, Q. C. and Moss Q. C. for the railway company.

The facts of the case and the points raised sufficiently appear in the judgments.

PATTERSON, J. A.—Conmee & McLennan commenced their action against the railway company in the Queen's Bench Division on 5th October, 1885, and issue was joined in it on 17th November, 1885.

The railway company's action against Conmee & McLennan was commenced in the Chancery Division on 31st October, 1885, and issue was joined in it on or about 14th November, 1885.

It will be convenient to distinguish the actions as the Queen's Bench Division action and the Chancery Division action, and also, for the sake of distinctness and brevity, to speak of Conmee & McLennan as the contractors, and of the Canada Pacific Railway Company as the company.

In the Chancery Division action the contractors gave notice for trial by a jury, and on motion on the part of the

**Present.*—HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, JJ.A.

company, an order was made by the Master in chambers on 17th November, 1885, striking out that jury notice.

The contractors also moved in chambers for an order to stay the proceedings in the Chancery Division action until the determination of the issues in the Queen's Bench Division action, and that motion was refused by the learned Master on 19th November, 1885.

Thereupon the contractors appealed from the decision of the learned Master on both motions, and their appeals were dismissed and the action of the master affirmed by the Chancellor in Chambers on 2nd December, 1885.

From that decision the contractors have appealed to this court.

The company moved to stay proceedings in the Queen's Bench Division action until the determination of the issues in the Chancery Division action, and on the 25th of November, 1885, an order was made by the learned Master in chambers staying all further proceedings in that action, with liberty to the contractors to raise in the Chancery Division action by defence, set off, or counter claim, or otherwise as they should be advised, all questions intended to be raised by them in the Queen's Bench Division action.

From that order the contractors appealed to Mr. Justice Rose in chambers, and that learned judge, following what he understood to be the effect of the Chancellor's decision in the other action, dismissed the appeal and affirmed the master's order.

The contractors appeal to this court from the decision of Mr. Justice Rose.

We have therefore two appeals in the Chancery Division action, viz., from the order striking out the jury notice, and from the refusal to stay the Chancery Division action pending the decision of the Queen's Bench Division action; and we have an appeal in the Queen's Bench Division action from the order staying that action.

The jurisdiction of this court to entertain these appeals has been questioned on the grounds that they are from orders of a judge in chambers, and that the orders were

respecting matters in the discretion of the judges who made them.

These objections, though at first sight formidable, will, on examination of the statutes, appear untenable.

Section 13 of the Judicature Act extends the jurisdiction of this court to any judgment or order, save as thereafter mentioned, of the High Court of Justice or of any judges or judge thereof.

This language clearly includes orders made in chambers by a judge.

Then we have a restriction in section 35 in the case of an interlocutory order, in case, before the passing of the act there would have been no relief from a like order by an appeal to the Court of Appeal.

These orders are clearly interlocutory, but that feature alone does not preclude an appeal. The section assumes that some interlocutory orders were appealable before the act; and under the Court of Appeal Act, R. S. O. ch. 38, secs. 2 and 18, the general jurisdiction of the court included every order made by a court or a judge sitting alone as, and for the court, under any of the powers given by the Administration of Justice Act, whether such order was final or interlocutory. That act did not give an appeal from an order made in chambers; but having regard to the extension of the jurisdiction by section 13 of the Judicature Act, and also to section 36, which, by its reference to the preceding section, indicates that the restrictions of section 35 apply to interlocutory orders in chambers as well as to orders made in court, the phrase "relief from a like order" must be understood to refer to the character or effect of the order, and not to intend any distinction between an order made in court and one made in chambers. But while section 35 makes no distinction between an order made by a judge in chambers and a similar order made by the same judge sitting alone as and for the court, we have a further restriction in section 36, which has now to be considered.

* 36. Save as aforesaid, every rule, order or decision

made by a judge of the said High Court in chambers, except orders made in the exercise of such discretion as by law belongs to him, may be set aside or discharged upon notice by any Divisional Court; and no appeal shall lie to the Court of Appeal from any such rule, order or decision unless by special leave of the judge by whom the same was made, or of the Divisional Court aforesaid, or of the Court of Appeal."

Special leave has been given to appeal in this case, and the only question, therefore, is whether these orders, or either of them, can be said to be made "in the exercise of such discretion as by law belongs" to the judge within the meaning of that phrase as used in section 36.

[The learned judge held that the exception did not apply, being applicable only when some enactment, either by its terms or by necessary implication, made the decision in Chambers final. The discussion, in the course of which the cases of *Golding v. Wharton Saltworks Co.*, 1 Q. B. D. 374; *Exp. Sheard*, 16 Ch. D. 107; *Ormerod v. Todmorden Mill Co.*, 8 Q. B. D. 664, and *In re Terrell*, 22 Ch. D. 473, were referred to, is omitted because the section having been amended by 49 Vict. ch. 16, sec. 39, by striking out the exception, the question is not likely to arise again.]

The cases to which I have referred, and many others, affirm the settled practice not to interfere with the exercise of the discretion of the court or judge, where it has been exercised on a proper principle, unless justice clearly calls for interference.

"If we have the jurisdiction to review," said Brett, L. J. (8 Q. B. D. 679), "it seems to me that the legislature places the discretion in this court on an appeal in the place of the discretion of the learned judge, who the court thinks has not exercised his discretion rightly. This court lays down for itself the rule, which I think is the right one, that it will not exercise its own discretion unless it thinks the case is perfectly clear."

I should certainly hesitate to interfere with the order that has been made, if it were made clear that the questions indicated by the statement of complaint were those really to be tried.

There are, it is true, grave charges of fraud and the like, which, as one can easily understand, the parties charged may prefer to have tried by a jury ; but they do not differ in their character from issues that have always been tried in Chancery without a jury, and these charges would probably involve questions of measurements and calculations which could be more satisfactorily tried by a judge without a jury, and it may be also that part of the relief sought could only have been obtained in equity under the old system.

But we have no information, by affidavit or otherwise than from the pleadings of the party who seeks to deprive the other of his *a priori* right to a jury, as to what the questions really for trial are likely to be.

— On this account, and in view of the orders we are about to make on the other appeals, I agree with my learned brothers that we should allow the appeal from the order striking out the jury notice, leaving the judge before whom the actions come on to be tried free to deal with the mode of trial as may appear proper.

— The order staying the Queen's Bench Division action and compelling the contractors, notwithstanding their action being the earlier of the two, to put their demands in the form of a counter-claim in the Chancery Division action, involves some difficulty, for the reason amongst others that it is somewhat novel in our procedure.

It is made under the authority of sec. 16, sub-sec. 8, of the Judicature Act, which is identical with sec. 24, sub-sec. 7, of the English Judicature Act of 1873, and which declares that : “ (a) The High Court of Justice and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter ; (b) so that, as far as possible, all

matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided."

The "cause or matter" in question is the Queen's Bench Division action brought by the contractors against the company to recover money alleged to be due to them.

The Court thereupon became bound by the act to grant to the company all such remedies whatsoever as the company may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by the company in that cause or matter (that is to say, in the Queen's Bench Division action), so that all matters in controversy between the company and the contractors may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters in controversy avoided.

But the company, instead of asserting the right which I read the sub-section as affirming, to have all disputes settled in the pending action, and to avoid multiplicity of actions, instituted the Chancery Division action against the contractors, alleging that they had been largely overpaid, and had fraudulently obtained those overpayments, and then procured the order to compel the contractors to drop their action; or, in other words, to put an end to the "cause or matter" in which, as I read the statute, it was the privilege of the company to seek for appropriate remedies for all claims against the contractors, and to become parties to, and litigate their claims in, the other cause or matter so newly instituted.

The authority relied on for the application is *Thomson v. South Eastern R. W. Co*, 9 Q. B. D. 320, in which an order like that now in question was made.

The only report of the case is, I believe, that of the arguments and judgments in the Court of Appeal, where it was heard before Brett and Holker, L.JJ. I do not find any note of its earlier stages in the Weekly Notes, but from the judgments in appeal I gather that the master made

the order on the ground that the claim in the second or cross action was the more substantial of the two ; that that order was upheld in chambers because the second action was threatened before the first was begun ; that a Divisional Court of the Queen's Bench Division, consisting of Field, J., and Huddleston, B., rescinded the order, holding that the party who first brought an action should be entitled to the benefit of his diligence, Huddleston, B., thinking that that rule might yield to the necessities of the administration of justice or for saving the time of the court ; and that the Court of Appeal restored the order on the ground that the plaintiffs in the cross action had substantially everything to prove, and therefore ought to have the right to begin at the trial. Brett, L.J., stated that the applications seemed to him to be made, and could be effectually made, only under sec. 24, sub-sec. 7, of the Judicature Act, 1873.

The decision is high authority for the use made of the sub-section, and it is with diffidence, and a sense of exposing myself to a charge of presumption, that I venture to say that I should not have taken it to support an order by which the plaintiff in an earlier action is made to change his position to that of defendant in a later one, at the instance of the defendant in the former, who might, without any special aid from the court, have pursued all his remedies in that action ; but I fancy I read the sub-section as it was understood by the judges in the Divisional Court, and, if I am not mistaken, by the judge in Chambers also.

Then, assuming that the sub-section authorises, in a proper case, such an interference with the position of the parties to the litigation, was this a proper case ?

In the Queen's Bench Division action the contractors allege that they contracted to do certain work in the construction of the company's railway, setting out some of the provisions of the contract, and amongst them, that they were to be paid, of the prices named in their tender, ninety per cent. in cash of the value of the work done on the progress estimates of the manager, the balance to be paid

on completion of the work to the satisfaction of the manager. They aver that the work has been completed, and that the manager has expressed himself satisfied with it, and has passed the final estimates of the contractors for the work, but that the company have restrained the manager from granting his certificate, and have wrongfully ordered the manager not to grant the same. The claim is for \$200,000 on the contract work, and a balance of \$1,600 for other work.

The company's statement of defence charges that the approximate measurements and certificates are false and fraudulent; the measurements overstated; that it was made to appear by them that the contractors were entitled to much larger sums than under the terms and conditions of the contract they were entitled to receive; that the pretended measurements and estimates were false and fraudulent to the knowledge of the contractors, and were made and furnished at their instance, and by persons acting collusively and in connivance with them; that the contractors have been paid for all the work justly and truly performed, done or executed by them under their contract or otherwise; with some other allegations.

The contractors replied, setting out some provisions of the contract on the effect of which they rely, and denying the allegations of fraud.

And the company join issue.

In the Chancery Division action the contract is set out in its material parts in the statement of claim, and it is averred that the manager paid the contractors nearly a million and a half of dollars, but without having ascertained or certified to the character of the work alleged to be done, or its value; that these things were only ascertained by the company after the termination of the engagement of the manager, and about the month of August, 1885; details of figures are then given to shew the over estimates and over payments to nearly \$600,000; collusion between the contractors and the engineer in charge and the manager are alleged; it is charged that the contractors have been

paid over \$90,000 for works constructed for their own use, and which by the contract they were to do at their own expense; and that they have violated a stipulation as to letting their machinery and plant remain at the works or are about to remove it; and the prayer for relief follows.

It seems clear that not only might all these allegations, charges and claims for relief have been advanced in the Queen's Bench Division action by way of defence and counter claim, but the greater part of them were in substance and effect so advanced in that action.

There is no admission either in the Queen's Bench Division action or the Chancery Division action of any *prima facie* claim of the contractors, nor is it admitted that they have vouchers which, if unexplained and unimpeached, would, under the terms of the contract, be evidence of their claim; and, in fact, the contractors themselves shew that they have not the final certificate. On the contrary, it is denied that the contractors did the work for which they seek payment, and it is denied that the certificates they rely on are such as the contract requires. There is nothing to relieve the contractors of the onus of proving, in the face of a determined contest, every particular of their claim, and having done so, if they can make a *prima facie* case, they have then to meet the issues of fraud and collusion, the proof of which is of course on the company.

I am unable to see any intelligible principle on which the contractors should be prevented from conducting their action in the way they desire, or be deprived of the position they occupy.

The case of *Thomson v. South Eastern R. W. Co.* is not a parallel case, and the principle on which the Lords Justices professed to interpret the Judicature Act seems to me to be opposed to admitting that case as a precedent to be followed in one like the present.

The plaintiff there had built a steam vessel for the defendants, or, as there were cross actions, we shall avoid

confusion by dropping the words plaintiff and defendant, and saying that Thomson had built the vessel for the company. The price was £35,000, payable in five payments of £7,000 each. Four of these were paid, and the action was to recover the fifth. Thomson's action was commenced on 28th November, 1881, and the claim was dated 5th December, 1881. The cross action of the company against Thomson was commenced on 30th November, 1881, and the claim in it was dated 29th December, 1881. It does not appear that a defence was filed in either action, and I think we may safely assume that no defence was filed in the first action, but that the case of the company was shewn merely by the statement of claim in the cross action, and by whatever affidavits or documents were used on the application. That case was that by the terms of the contract the company had the right to return the vessel if she did not attain a certain rate of speed, and to be repaid the purchase money. Upon this the claim was founded for repayment of the £28,000, with a further sum for damages, involving of course exemption from paying the instalment for which the plaintiff sued. Before the Judicature Act, as Brett, L. J., remarked (328-9), the company would have had no defence as to the payment of the price.

This short reference to the nature of the actions shews how widely different the position was from that of the parties before us.

The principle on which the court professed to interpret the Judicature Act was thus stated by Brett, L. J.: "I think the constant efforts of the courts since the passing of the Judicature Acts has been to so construe the Judicature Acts, and all the rules and orders under them, as to make as few absolute or unconditional, or what is called hard and fast rules, as can possibly be, and to make the interpretation of the acts and all the rules and orders so large that the Courts can (unless they are prevented by the words of the statutes) exercise a discretion in each particular case, so as to do that which is most just and

expedient between the parties. It seems to me that these applications were made, and could be effectually made only under sec. 24, sub-sec 7, of the Judicature Act, 1873 and therefore that which has happened, and the judgments given in the Divisional Court, oblige us to consider what is the proper mode of administering this peculiar jurisdiction upon such a point as is now raised." Then he pointed out that the judgments of Field, J., and Huddleston, B., seemed to him to reduce the matter to a hard and fast rule, and continued: "Now I desire to carry out what I have said has been the rule of conduct, as far as I know, in all the courts and upon both sides of the Court of Appeal ever since the passing of these acts; I desire to keep the exercise of the jurisdiction given to the courts under this sub-sec. 7 as large as I can, so as to enable the court to do what is right and just in each particular case between the parties. I therefore think that there is no hard and fast rule, in the case of cross actions, that the one which was commenced last must be the one to be stayed. I think that the judge must exercise his discretion as to what is the fairest mode, upon taking all matters into consideration, of trying the several disputes which exist between the parties; if there is nothing to guide him but who was the first to issue out the writ, I should say that it would be a wise and proper mode of exercising the discretion to give that party the advantage of his diligence. For instance, if the burden of proof (and I only give this as an instance) is as much on one side as on the other with reference to separate parts of the transaction, then I should think that the person who has issued the first writ would have gained the advantage, and that the action in which he is plaintiff ought to be the action which is to be carried on; but it seems to me that if all the substantial burden of proof is upon the person who is plaintiff in the action which was begun second, it is not conclusive as to a fair and just mode of trying the dispute between the parties to stay the action in which he would begin who has the substantial burden of proof as to all the controverted matters. It would be unfair to deprive him of being the plaintiff and so having the right to begin, and it would be hard to make him the defendant, although the burden of proof lies upon him, and so to give his antagonist the power of anticipating him in matters which, but for the order of the court, he could not do. Therefore, it seems

to me that the judge must consider what is the fair mode of trying that which is shewn to be the substantial matter when it will come before the jury."

He shewed why he did not agree with the reasons given for any of the decisions in the matter, and that while the order should be the same which Williams, J., had made in Chambers, the reasons would not be the same. Holker, L. J., adopted the principles laid down by Brett, L. J., as to the spirit in which the Judicature Act should be construed, but seems not to have taken so strong a view of the necessity for interfering in the particular case. He said: "I do not know that I agree with my learned brother in thinking the proceeding so very important; it rather shews me the enormous and the undue importance that the parties to actions attach to the right of having the last word. As far as I can make out, the right to the first word and the last is not such a substantial advantage as the parties seem to think. * * * The reasoning of the learned judges who have dealt with this matter has not satisfied my mind with regard to the principles which they have adopted. As I understand, the master finds the rule to be this, that the most substantial claim prevails; but I cannot think it would be just to let the most substantial claim prevail or have precedence simply because it is the most substantial. No doubt the question which is the larger claim may be sometimes material, but it is not the decisive question. The judge at chambers was of opinion that the party who has first threatened litigation ought to have the conduct of proceedings. I do not think that a sufficient ground. Then the Divisional Court held that the party who first brought an action should be entitled to the benefit of his diligence, and that he should prevail over the other. If a man is diligent, and more diligent than his opponent, and has taken care to secure to himself an advantage, it may be fairly said he should have some consideration for that. But then, after all, it may turn out in such a litigation as this, that it was an accident, or that it was a misfortune on the part of his opponent, and in the present case it seems to have been simply a misfortune. Therefore, thinking over these grounds that have been advanced, it does not seem to strike me as being very reasonable that any of these principles, standing alone and unaffected by anything else in the case, should prevail. In such a matter as this I cannot be confident; but it seems to me to be reasonable

that the party to the litigation who has substantially everything to prove in it, and who would substantially fail unless the necessary evidence were produced, should be allowed to commence proceedings at the trial, and to have control of the action."

If any general rule is to be deduced from these judgments, it seems to me to be merely that which is found in the last words which I have read, viz., that the party who has the substantial burden of proof should be allowed to begin at the trial, but that even that rule must not be made a hard and fast rule.

It clearly will not apply in the present case to aid the company, because the whole burden of proving their case remains with the contractors. They say we have earned money which the company have not paid us, and the company answer that is not so, but on the contrary you have been overpaid, and ought to refund large sums which you fraudulently obtained.

Then it must not be overlooked that the only reason given by the Court of Appeal for altering the formal relation of the parties in the action is, that on a trial before a jury the first and last words are deemed an advantage, and the company invoke that rule, and in the same breath insist, and insist successfully, that their action ought to be tried without a jury.

There is nothing in the judgments of the Lords Justices in *Thomson v. South Eastern R. W. Co.* to suggest that they would have thought an order such as they made a proper one to be made in a case like the present, but I should infer the contrary.

I am therefore of opinion that we should allow the appeal from the order staying the Queen's Bench Division action with costs, and rescind that order, with costs of the motions before the Master and in Chambers.

It is not disputed, but is conceded by the action of the company in making the applications, and is assumed as a matter of course in the judgments I have discussed, that all the disputes should be tried and disposed of in the one action.

It therefore follows that we should also allow the appeal from the refusal to stay the proceedings in the Chancery Division action, and make an order to stay those proceedings, with liberty to the company to counter-claim in the Queen's Bench Division action. That order should be without costs of the appeal, the costs of the applications below being costs in the action.

BURTON, J. A.—It is not easy to place a construction upon the language used in section 36, excepting from its operation "orders made by a judge in Chambers in the exercise of such discretion as by law belongs to him;" but having regard to the wording of the preceding section, and the general tendency in all recent legislation, both here and in England, to enlarge the right of litigants to have decisions reviewed, and the fact that any other construction would in effect stand in the way of having a very large number of decisions considered and reviewed even by a Divisional Court, as has hitherto been the case, I have come to the conclusion that the discretion referred to in that section is a discretion given to the judge by some enactment either in express terms or by necessary implication, and that as to such cases the section in question is to be considered as a statutory declaration that any judgment given in pursuance of the discretion so vested in him is to be considered final. If, in point of fact, the legislature intended to deprive suitors of the privilege they have hitherto enjoyed of having a decision in Chambers varied or reversed by a Divisional Court, it is far safer for us to leave them to amend the Judicature Act than to make so sweeping a change by judicial construction.

I also entirely agree with the conclusions arrived at by my brother Patterson as to the appeals themselves.

As to the appeal from the order striking out the jury notice, I wish to add a few words.

The motion was made upon reading the pleadings merely, and the Master, assuming it to be a case coming within sec. 45, as one over which the Court of Chancery, previous to

the passing of the Judicature Act, had exclusive jurisdiction, made an order to strike out the jury notice, which, upon that assumption, was perfectly correct.

The learned Chancellor, I think very properly, held that in that opinion the Master was mistaken; that it was an action which could at any time have been brought at common law, and no one can read the plaintiffs' statement of claim without seeing that that is so. See *Batterbury v. Vyse*, 2 H. & C. 42, which is, however, more applicable to the plaintiffs' right to maintain what was formerly a common law action in the other suit.

In *Fox v. Hill*, 2 De G. & J. 356, where an injunction had been granted to stay an action at law on a note alleged to be illegal and void, the Court of Appeal dissolved the injunction, Lord Justice Turner remarking: "Either the security is void or it is not. If it is void the plaintiff has no necessity to come to equity at all for an injunction against the proceedings at law; if it is not void, he has no equity to maintain his bill."

It comes then to this: the defendants have a statutory right to have the case disposed of by a jury, which they may be deprived of on an application to the court or a judge, the burthen of shewing that the discretion of the court ought to be exercised in the opposite manner resting on the plaintiffs.

Do the plaintiffs satisfy that onus by alleging in their statement that the defendants have been guilty of fraud, and was the judge justified in assuming, in the absence of evidence, that if that fraud should be established, the accounts and inquiries would be of so complicated a character as not to be the proper subject of inquiry before a jury?

With great deference, I think not, but that his proper course would have been to set aside the Master's order, without prejudice, to a fresh application, if the parties should be so advised upon affidavits which the other side would have an opportunity of answering.

It was urged before us that the judge ought not, on

perusal of the pleadings alone, to have made such an order, which Mr. Robinson answered by quoting a remark of Sir George Jessel, in which, in reply to a similar objection, he said that "in his opinion that was just what he ought to have done;" but before we can treat that dictum as at all applicable to the present case, we must consider what were the particular facts with which he was dealing.

The plaintiff there had gone into the Chancery Division to have an agreement cancelled, on the ground that it had been obtained by fraudulent misrepresentations; as the Master of the Rolls describes it, "not a case turning on a single misstatement, but a series of misrepresentations." The plaintiff selected that forum, and he could not complain if, upon his own statement, the court was convinced that it was a case peculiarly cognisable by that court, and having made his selection, that he should not be at liberty, without good reason, to shift the jurisdiction and compel his opponent, who had answered his complaint, to go before a jury.

In such a case the judge was merely giving credit to the statement of the party making the application, that the case was one for cancellation of the contract for fraud, a very different thing from assuming as true a statement made by his opponent. The learned judge there acted upon the applicant's own statement—what better evidence could he have in dealing with such an application—and having exercised his discretion upon it, the Lords Justices, most properly I think, refused to interfere.

I do not at all question the propriety of the rule laid down in the courts as to interfering with the discretion of a judge in a matter of this kind; it is a wise and wholesome rule, and it ought to be a strong case which should induce an Appellate Court to interfere; but here I say the learned Chancellor has not exercised a discretion, and had no material before him on which he could properly exercise it.

The same eminent judge from whom Mr. Robinson quoted has in another case given a very clear definition of how such an act as that we are construing should be

treated ; and in stating his own view, intimates his pleasure in finding that two of the vice-chancellors agreed in it and he then proceeds to refer to their opinions thus :

“ In *West v. White*, 4 Ch. D. 631, V. C. Bacon used this language: ‘I am asked on one side to give effect to the statutory title, and on the other to exercise a discretion, which I cannot do, unless I decide that there are reasons which entitle me to deprive the defendant of the statutory right which he has.’”

And V. C. Hall, in *Clarke v. Cookson*, (2 Ch. D. 746) says : “ Where the case is of a nature fit to be tried by a jury, the right of the plaintiff or defendant should ordinarily not be interfered with.” And Sir George Jessel himself refers to the matter in this way : “ The rule was intended to apply to that class of actions which a jury is not, as a rule, competent to deal with, either from their great complexity as regards facts, or from fact and law being so intermingled together that it would be difficult, if not impossible, to direct a jury by separating the law from the fact, or because the questions as regards the law are of such a delicate nature, and require a knowledge of such refined law, that they could not conveniently be presented to a jury.”

For a considerable time after the passage of our act it was a usual thing for the jury notice to be struck out on no other ground than that the defendants were a corporation, and it was assumed that they might not get justice at the hands of a jury. I do not think any such order would be made at the present day.

Not many years since, I declined at *nisi prius* to try an action against an insurance company upon a life policy, where such an order had been made, unless the parties would consent to the jury notice being restored.

The case of *Hunt v. Chambers*, 20 Ch. D. 365, is, I think, important as shewing that the Court of Appeal will interfere where the judge has exercised his discretion and struck out a jury notice.

There the learned judge below said very emphatically, no less than three times, that he made the order he did “ on the ground that there was no reason shewn to him for a trial

before a jury," and the court reversed his decision because it was for the party who says there shall not be a trial before a jury to shew a reason why it cannot be so tried.

And Lord Justice Cotton in the same case says: "The judge ought before making the order depriving the party who has given notice of that which is his right, viz., to have the action tried before a jury, to be satisfied that there are reasons why the case should not be tried before a jury, and that the order ought not to be made merely because trial before a jury will be a more expensive mode of trial, or because there is no sufficient reason for trying it before a jury."

The onus of proof having been put on the wrong party, the Court of Appeal overruled the decision.

Now in the present case, what was there shewn to deprive the defendants of the right to which they were entitled? The plaintiffs file a bill charging the defendants with fraud; no very reasonable ground, in my opinion, for depriving them of the right to a jury trial, but rather the reverse. See remarks of Lord Esher in *Hoult v. Anderson*, 2 Times L. R. 1. And then it is assumed that if the fraud is established, the accounts and inquiries may be of a complex and intricate character; that may or may not be so, there is no evidence upon the subject.

The defendants' counsel stated on the argument a set of facts which, if established in evidence, would lead rather to the conclusion that the inquiries would not be of a character to render it difficult for a jury to deal with, but there is nothing shewn upon affidavit to shew how this would be; if these facts had been established before the judge and he had exercised a discretion, I am quite prepared to admit that we ought not lightly to interfere, although I think it is eminently a question which it would be better to leave to the judge presiding at the trial. I wish to place my decision distinctly on the ground that there has been nothing whatever shewn here to displace the defendants' right to a jury, and that the mere allegation of fraud by their opponents, and the possibility of the inquiries being complicated, of which there is no evidence, and which the

defendants have had no opportunity of explaining or denying, are not material upon which properly to base a judicial discretion. In the view which we take of the other appeals this becomes of little importance, except on a question of costs; but as I entertain a strong opinion that the order ought not to be sustained, I have thought it right to state my reasons fully.

OSLER J.A.—The first question is, whether an appeal will lie from these orders.

The Judicature Act, section 13, gives an appeal, save as afterwards excepted, from every judgment or order of the High Court or any judge thereof.

The exceptions with which we are concerned are those contained in sections 35 and 36, which relate to interlocutory orders and orders in Chambers.

The former contains certain exceptions in regard to appeals from interlocutory orders, and is divided into two parts, the first of which relates to appeals to a Divisional Court, the second to appeals to the Court of Appeal.

The former provides that there shall be no appeal to a Divisional Court from any interlocutory order, whether made in court or chambers, in case, before the passing of the act, there would have been no relief from a like order by an application to a Superior Court.

The effect of that exception is, that if there was any interlocutory order in court, or any interlocutory order in chambers, from which, before the passing of the Judicature Act, there was no appeal to the full court, in case of a like order you cannot do so now. You cannot go to a Divisional Court from chambers now in any case where you could not have gone to a Superior Court from chambers before the act.

Speaking generally, and without reference to any further exception contained in section 36, that exception leaves *all* interlocutory orders made by a judge in chambers appealable to a Divisional Court.

The second exception in section 35 is this, there shall be

no appeal to the Court of Appeal (*not*, as in the former part of the section, from an interlocutory order whether made in *court* or *chambers*, but) from an interlocutory order, in case, before the passing of the act, there would have been no relief from a like order by an appeal to the Court of Appeal.

In terms this language at first sight seems to embrace *all* interlocutory orders, whether made in court or chambers, and therefore absolutely to forbid an appeal direct from Chambers; but when it is observed that the term "in Chambers" is dropped in the second part of the section, and it is borne in mind that in no case did an appeal ever lie from Chambers to the Court of Appeal before the Act, we see that this branch of the section must be directed, not against appeals from chambers, but against appeals from the court; for if, by section 36, all appeals to the Court of Appeal from orders in chambers, are forbidden, as in fact they are, except by special leave, and if no such appeal ever lay before the act, it would be unnecessary and absurd to enact in section 35 that none should lie now except in cases where they had lain before. Full effect is therefore given to the clause by holding it to apply to appeals from orders made in court, to which class of appeals it is entirely appropriate, while it is quite irrelevant to the orders now in question.

As they are interlocutory orders in chambers, we have now to look at sec. 36, reading into it the first part of sec. 35. It then, in effect, reads as follows :

Every rule or order made by a judge in chambers except an interlocutory order, from which, had it been made before the passing of the act, there would have been no appeal to a Superior Court, and except orders made in the exercise of such discretion as by law belongs to him, may be set aside or discharged by any Divisional Court. And from any order which may be or has been so set aside or discharged, there shall be no appeal to the Court of Appeal, except by special leave of the judge who made it, or of the Divisional Court which may have reheard it, or of the Court of Appeal.

As there can be no doubt that the orders in question, or like orders, had they been made before the passing of the Judicature Act, might have been set aside or discharged by a Superior Court, they are not within the exception in sec. 35 ; and as the appeal comes before us by special leave, duly granted, the condition in the latter part of sec. 36 has been complied with.

[The learned judge then dealt with the question whether the orders were within the exception in section 36 which precluded appeal to a Divisional Court or the Court of Appeal, as being orders made in the exercise of a discretion which by law belonged to the judge. He held the orders were appealable notwithstanding this section, but it is thought unnecessary to report the judgment on this point as the question is of no importance beyond this particular case, sec. 36 having been amended by an act of the last session (49 Vic. ch. 16 sec. 39) by striking out the exception.]

I pass over for the present the order to strike out the jury notice in the action brought by the railway company, as some considerations apply to it which do not apply to the orders relating to the stay of proceedings.

On the case presented by the pleadings in both actions ought that of the contractors to have been stayed, and made, as the learned chancellor describes it, an appendage to that subsequently brought by the railway company ? With great respect, I think that it should not.

The action of Conmee & Co. is brought to recover the balance of 10 per cent. upon certain progress estimates or certificates for work done under the construction contract between them and the railway company. They excuse the want of the manager's certificate of the final completion of the work to his satisfaction, by alleging that it has been wrongfully withheld by him at the instance and by the procurement of the company.

A further claim for work done outside of the contract is also included in their action.

The company defend by putting the contractors to the

proof of their whole case, and also by alleging that nothing is due to them on foot of the contract, but on the contrary, that they have been largely overpaid, the progress estimates, measurements and certificates on which the 90 per cent. has been from time to time paid being false and fraudulent to the knowledge of the contractors, and procured and given by collusion and connivance by the company's officers, and falsely representing measurements of more work than was actually done.

After the commencement of that action, the company brought an action against the contractors in the Chancery Division, alleging the false and fraudulent character of the progress estimates, and claiming repayment of the moneys which had been overpaid thereon.

That is the substance of the railway company's action as it was treated by the learned chancellor and the master. The statement of claim contains a certain amount of ornamental verbiage, which adds nothing to the burden of proof to be sustained by the company.

The case appears to me to be one for the application of the rule laid down in *Thompson v. The South Eastern R. W. Co.*, 9 Q. B. D. 320.

From the very nature of their action, a substantial burden of proof rests upon the contractors, and it is not for us to speculate upon their ability to meet it by the evidence of Ross, more especially when his present position as regards the company is noted, they having abandoned their action against him. Nor is it to be overlooked that other difficulties may have to be encountered by the contractors, upon which at present no authoritative opinion can be pronounced, such as the question as to the validity of the progress certificates, their effect as *prima facie* evidence of quantities, measurements, etc., which may or may not turn out to be important. Such as they are, it is open to the company to raise them under their defence, and in the absence of any formal admission or abandonment of them, they will have to be dealt with at the trial when they are there presented for decision.

The case of *Hyman v. Helm*, 24 Ch. D. 531, cited in the judgment below, so far as it can be applicable to a case like the present, where cross motions are made to stay actions pending within the same jurisdiction, seems to me to be a decision rather opposed to the contention of the railway company, as they occupy nearly the position of the plaintiff, whose motion in that case was refused.

These considerations, and the fact that the contractors' action is prior in point of time, ought, I think, to have been treated as a sufficient answer to the motion of the company to stay the proceedings in that action.

Then how should their own action be dealt with? But for its intimate connection with the defence in the other action, I should have been much disposed to treat it in the same way and to retain them both. But the company's right to recover in it depends upon their ability to prove the facts which constitute their defence in the former; their claim in the one is co-extensive with their defence in the other, and no substantial relief is claimed in the one which the company could not have, if they chose to ask for it, on proof of the defence in the other.

If, therefore, we conclude that it is not just or expedient under the circumstances to stay the contractors' action, and to give the company the control of the litigation, I think it follows that the second action is unnecessary, and that the relief to which each party is entitled should be worked out in the action in the Queen's Bench Division.

It seems to me not material that one of the actions is in the Chancery Division, and that the causes of action in both are such as would have been within the jurisdiction (though not the exclusive jurisdiction) of the Court of Chancery before the passing of the Judicature Act. One division is, as regards its machinery, as convenient as another for working out the rights of the parties, whether that is to be done by the judge at the trial or by a master who is an officer of all the divisions, or an official referee. As Mr. Justice Patterson has pointed out in *Pawson v. Merchants' Bank*, 11 P. R. 72, our act does not follow the

English act in assigning certain actions to the Chancery Division, or recognizing any mode of trial as peculiar to actions in that division. See *Holloway v. York*, 2 Ex. D. 333, (C. A.)

That is a distinction to be borne in mind in applying the English cases to the question under consideration, as with us the fact that a cause of action is of an equitable character is in itself no reason for bringing a separate action for it in the Chancery Division, when it might as conveniently form the subject of a defence and counter claim in an action already pending elsewhere.

The reasoning on which such cases as *National Life v. Egan*, 20 Gr. 469, proceeded, seems to have lost its force since the Judicature Act came into operation.

It may be quite right and reasonable that, because of the greater facilities for obtaining a jury in the Queen's Bench or Common Pleas Divisions, an action in one of those divisions should, as it were, draw to it another in the Chancery Division involving the same questions, if those questions or any of them are proper to be tried by a jury, or that an action in the Chancery Division involving such questions should be transferred to a Common Law Division, or tried at the sittings for the trial of actions in those divisions. Such an action may then be tried with or without a jury as the presiding judge may think proper. But there is not the same reason for transferring an action to the Chancery Division from one of the other divisions, merely because it would formerly have been cognizable in equity, or is not proper to be tried by a jury, since it may as readily be disposed of in any division by the judge alone or by the proper official.

As to the order striking out the jury notice, the disposition we make of the other orders perhaps renders it unnecessary to consider it; but I may say that in such a case as this, where the substantial cause of action is not one which would formerly have been within the exclusive jurisdiction of the Court of Chancery, and where, therefore the party has *prima facie* the right to require a jury, and

where personal fraud is charged as the ground of action or defence, it appears to me that as a rule the question whether the jury notice ought to be struck out can be better disposed of at the trial by the judge who has to try the case, when the real questions to be tried have been ascertained and the parties know what they are disputing about, than by a judge in Chambers on the pleadings and affidavits.

That parties ought not lightly to be deprived of a jury when the question of fraud is raised in an action where there is *prima facie* a right to a jury, may be seen by the recent case of *Hoult v. Anderson*, 2 Times L. R. 1; *Hoare v. Bremridge*, L. R. 8 Ch. 22. And that the real substance of the action, and not its court dress, is to be regarded in determining by what tribunal it should be tried is affirmed by Bowen, L.J., in *Gardner v. Jay*, 29 Ch. D. 50, 58, notwithstanding a dictum apparently to the contrary of Jessel, M.R., in *Rustin v. Tobin*, 10 Ch. D. 565.

In applying the decision of the English courts on this question, it is to be observed that in most if not in all of them the contest is whether an action, which is *prima facie* triable by a judge, because it has been brought in the Chancery Division shall, notwithstanding, be tried by a jury; and the onus is on the party who asks for the jury, not as here on the one who seeks to deprive his opponent of it. These cases would have a closer application where with us it becomes necessary for the party to make a special application for a jury, or to make out affirmatively that a jury notice ought to be retained, as *e. g.* in actions which would formerly have been exclusively cognizable in the Court of Chancery, or where equitable issues are raised.

As the present motion is not for a reference, it is irrelevant to argue, as a reason for striking out the jury notice, that long and complicated accounts or scientific inquiries are involved or likely to arise. Whether there is a jury notice or not, the judge at the trial will determine whether the case is one which ought to be tried without a jury, or

which ought to be referred in whole or in part, if the question ever arises.

I think the order is premature.

HAGARTY, C.J.O.—I am glad that the other members of the Court have been able to see their way to a decision as to the appealability of these orders. I suppose I ought to be ashamed to confess that I am wholly unable to form any clear opinion as to the proper conclusion under these curiously worded sections of the Judicature Act.

A DIGEST
OF
ALL THE REPORTED CASES
DECIDED IN
THE COURT OF APPEAL,
CONTAINED IN THIS VOLUME.

ACTION OF DECEIT.

See MISREPRESENTATION IN FORMATION OF COMPANY.

ACTIONS.

See INTERPLEADER ISSUE.

ADVANCES.

See CHATTEL MORTGAGE, &c.

AGENT.

See LOSS BY AGENT.

AGREEMENT.

The plaintiffs alleged and proved an agreement with the defendants that the defendants' vessel should proceed to B. and carry thence to C. a cargo of lumber; that the vessel did not go to B. as agreed; and that in consequence the plaintiffs had to procure another vessel and pay a

larger price than that agreed upon with the defendants.

The defendants alleged that the reason they did not go for the lumber was, because the plaintiffs did not give them or send to the master of the vessel the necessary orders. The judge who tried the action in the County Court of Lambton found this allegation untrue, and gave judgment for the plaintiffs.

Held, that this court could not reverse the finding in the court below upon this question, as the view of the facts presented by the appellants derived no support from the documents in evidence, and the court did not see its way to taking a different view of the evidence from that taken by the judge at the trial.

Held, also, that it was sufficiently proved that the plaintiffs were ready and willing to ship the lumber: but

Per BURTON, J. A. [dissenting].—The plaintiffs should have averred, and the onus was upon them to shew, and they did not shew their readiness and willingness to ship the lumber on the defendants' vessel.

The case, however, was disposed of in the court below on an immaterial issue; and as the appellants chose to rest their case upon a point which the judge found against them, the appeal should be dismissed.—*McKenzie et al. v. Dancey et al.*, 317.

See also BONUS TO RAILWAY COMPANY.

AMENDING PLAN.

See PROHIBITION TO COUNTY JUDGE.

ANTICIPATION, RESTRAINT ON.

See CROWN GRANT.

APPEAL.

See ASSESSMENT—INTERPLEADER ISSUE—SECURITY FOR COSTS.

APPLICANT, STATUS OF.
See PROHIBITION TO COUNTY JUDGE.

ASSESSMENT.

In an action to restrain the defendants, the corporation of the township of Dysart and the members of the Court of Revision thereof, from increasing the assessment on the plaintiffs' lands in that township to \$243,113.75., an increase of \$132,000 over the previous year, and from levying taxes thereon, the plaintiffs alleged that the proceedings of the Court of Revision were all parts of a fraudulent and improper arrangement and con-

spiracy that had been entered into before the holding of the said Court of Revision by the members thereof in conjunction with others, to increase the assessment of the plaintiffs. No evidence was adduced as to the actual or assessable value of the lands, but the plaintiffs stated that the highest bid they had had for them was \$80,000. It was further alleged that the members of the Court of Revision had before their election as councillors, complained that the company's assessment was not high enough, and had procured their election partly through announcing that if they were elected the assessment would be increased, and that they held a secret meeting with other persons and arranged for bringing on appeals to that Court.

Held, [affirming the decision of the Chancery Division, 9 O. R. 495,] that the matters complained of were not sufficient to affect the judgment of the Court of Revision so as to render it void for fraud; and that the plaintiffs had no remedy other than by an appeal to the Stipendiary Magistrate of Haliburton, under R. S. O. ch. 6, sec. 23. *Canadian Land and Emigration Co. v. The Municipality of Dysart et al.*, 80.

ASSIGN.

See PROHIBITION TO COUNTY JUDGE.

ASSIGNMENT FOR CREDITORS.

McP. Bros., a firm composed of two partners, by deed assigned to the plaintiff the partnership property and assets only, upon trust to pay the joint creditors only. The deed au-

thorized the plaintiff to pay creditors' claims either with or without interest.

On the day before the assignment the sheriff had seized the partnership property under two writs of execution (one of which he swore at the trial he thought was against one of the partners only, but there was no further proof of this), and put the plaintiff in possession as his bailiff. McP. Bros. then determined to assign to the plaintiff, and it was arranged between the sheriff and the plaintiff that on the execution of the assignment the plaintiff should retain possession, subject only to these executions.

Held, that the deed was not void under R. S. O. ch. 118, for intent to prefer the partnership creditors; nor for intent to prefer particular creditors, even if such intent were shewn, by the arrangement between the plaintiff and the sheriff, inasmuch as the assignors were not parties to such arrangement; nor by reason of the provision for payment of creditors' claims with or without interest. *Ewart v. Stuart et al.*, 99.

See also FRAUDULENT PREFERENCE.

ATTACHMENT.

See STOPPAGE IN TRANSITU.

ATTEMPT TO TAKE POSSESSION.

See BILL OF SALE.

BAILEE RECEIPT.

See WAREHOUSE RECEIPT.

BILL OF LADING.

See CARRIERS.

BILL OF SALE.

The defendants seized goods in the possession of McL. under an execution against him, and the plaintiffs, the Bank of M., claimed the goods as assignees under an unregistered bill of sale given by McL. to one F., as collateral security for indebtedness. There was no change of possession. Afterwards McL. agreed with the bank to hold the goods as tenant at will at a rental, and subsequently the bank made an ineffectual attempt to take possession.

Held [reversing the judgment of the County Court of Lambton], that the attempt to take possession of the goods was not sufficient to satisfy R. S. O. ch. 119, and the defendant was therefore entitled to succeed: *Parkes v. St. George*, 10 A. R. 496, distinguished.—*McKellar et al. v. McGibbon*, 221.

BONA FIDE PURCHASER.

See CROWN GRANT.

BONUS TO RAILWAY COMPANY.

A by-law of the defendant corporation, providing for the delivery of debentures to a railway represented by the plaintiffs as a bonus to aid them in constructing their railway, having been adopted by a vote of the ratepayers on October 16, 1873, was read a second and third time, and passed by the council on Octo-

ber 20th, but was neither signed nor sealed, because a month had not elapsed from its first publication, the notice required by 36 Vict. ch. 48, sec. 231, sub-sec. 3, to be appended to the copy of the by-law as published, having stated that the by-law would be taken into consideration after a month. On November 5th, 1873, a motion made in the council to read the by-law a second and third time, and pass it, was lost. On April 7th, 1874, after the election of a new council, it was finally passed, signed, and sealed. The by-law voted on by the council was to take effect and come into operation on the 30th December, 1873, while the copy published stated the 13th December, 1873, to be the day. The railway company were bound by their original charter to commence within three years, and to finish the road within eight years, which they failed to do within the specified time.

Held (affirming the decision of the Chancery Divisional Court, 8 O. R. 201), that the plaintiffs were not in a position to enforce the delivery of the debentures after the lapse of nine years from the passing of the by-law, when a total change of circumstances had taken place, and when the period fixed by the plaintiffs' charter for the completion of the railway had expired.

Per HAGARTY, C. J. O., and PATTERSON, J. A.—The by-law was not legally passed, and did not acquire a legal existence until April 7th, 1874. It was subject to the provisions of 36 Vict. ch. 48, sec. 248 (O.), and was invalid under that section, because it did not name a day in the financial year in which it was passed on which it was to take effect.

Per HAGARTY, C. J. O.—A variance between the proposed by-law and the

copy submitted to the ratepayers to vote upon, as to the day upon which it was to take effect, was also fatal to the by-law.

Per PATTERSON, J. A.—The acts of signing and sealing a by-law are formalities which sec. 248 makes essential to a by-law for contracting a debt, and those acts should be done at the meeting at which the by-law has been passed, or at all events during the tenure of office of the member of the council who presides. The direction in sec. 236, that a by-law carried by a majority of voters shall, within six weeks thereafter, be passed by the council which submitted the same, refers to the council of the year in which the by-law was submitted, and not merely to the council of the same municipality; it is not intended by sec. 236 that the passing by the council should be a mere formality, such as would be satisfied by the irregular passing on October 20th, 1873.—*The Canada Atlantic Railway Co. v. The Corporation of the City of Ottawa et al.*, 234.

2. In consideration of a bonus granted by the plaintiffs to the defendants the latter agreed (1) to bring their railway from Ingersoll to some point on the line of the Canada Southern Railway not more than half a mile east of the present passenger station of the Canada Southern Railway at St. Thomas, and (2) to run all their passenger trains to and from a small station on Church street. The defendants performed the first part of the agreement, and also the second, so long as the Canada Southern R. W. Co. permitted the use of their line from the point of junction to the small station on Church street; but on the refusal

of the other company to continue this privilege, the defendants discontinued the performance of this part of their agreement.

Held [affirming the judgment of FERGUSON, J.], that this was not a case in which the defendants should be directed specifically to perform their contract as to the Church street station, but that the plaintiffs were entitled to a reference as to damages for breach thereof.—*The Corporation of the City of St. Thomas v. The Credit Valley R. W. Co.*, 273.

BRIDGE.

See CORPORATION.

BUILDING, DAMAGES RESULTING FROM REMOVAL OF.

See REMOVAL, &c.

BY-LAW.

See BONUS TO RAILWAY COMPANY.

CARGO, READINESS TO RECEIVE.

See AGREEMENT.

CARRIERS.

The plaintiff agreed with the M. D. T. Co. for the conveyance of butter from London in Ontario to England.

The butter was carried from London to the Suspension Bridge by the G. W. Ry. Co., from the bridge to New York by the N. Y. C. R. R.

Co., and from New York to England by the G. W. Steamship Co., bills of lading being given at London to the plaintiff by a person who signed as agent severally and not jointly for the M. D. T. Co., the G. W. Ry. Co., and the G. W. Steamship Co.

The plaintiff sued for damage sustained by the butter, joining the three companies as defendants under the O. J. A. sec. 91.

It appeared that the damage occurred while the butter was on a lighter of the N. Y. C. R. R. Co., in New York harbor, and before it was actually delivered at the pier or on board a vessel of the Steamship Co.

Held, that the M. D. T. Co. by virtue of its through contract, was liable for the damage; that the responsibility of the Steamship Co. had not attached until after the damage was done, one of the terms of the bill of lading being that "this contract is executed and accomplished, and the liability of the G. W. Ry. and its connections as common carriers thereunder terminates on the delivery of the goods or property to the steamer or Steamship Company's pier at New York, when the responsibility of the Steamship Company commences, and not before;" and that inasmuch as the butter had been received in England by the consignees without objection, the Steamship Company would have been protected by conditions which by the bill of lading was made part of the contract, one of which was to the same effect as the condition in question in *Moore v. Harris*, 1 App. Cas. 318.

Quare, by PATTERSON, J. A., if the M. D. T. Co. and G. W. S. S. Co. could properly have been held jointly liable in this action.

The judgment of OSLER, J. A., 4 O. R. 723, as to the defendants the

Merchants' Despatch Co. was affirmed. *Hately et al. v. The Merchants Despatch Transportation Co. et al.*, 201.

See also STOPPAGE IN TRANSITU.

CASES.

Farmer v. The Hamilton Tribune Co., 3 O. R. 538, distinguished.] See LIBEL.

Foot v. Rice, 4 O. R. 94, affirmed.] See CROWN GRANT.

Longeway v. Mitchell, 17 Gr. 190, followed.] See FRAUDULENT PREFERENCE.

McAndrew v. Barker, 7 Ch. D. 701, discussed.] See INTERPLEADER ISSUE.

McMaster v. Garland, 8 A. R. 1, observed upon and explained.] See EQUITABLE ASSIGNMENT

Mitchell v. Goodall, 5 A. R. 164, observed upon and explained.] See EQUITABLE ASSIGNMENT.

Moore v. Harris, 1 App. Cas. 318, referred to.] See CARRIERS.

Murphy v. Halpin, Ir. R. 8, C. L. 127, distinguished.] See LIBEL.

Parkes v. St. George, 10 A. R. 496, distinguished.] See BILL OF SALE.

Patterson v. Maughan, 39 U. C. R. 371, followed and approved.] See CHATTEL MORTGAGE.

Watson v. Bradshaw, 6 A. R. 656, observed upon.] See "DONATIO MORTIS CAUSA.

CAVEAT EMPTOR.

See SALE OF GOODS, 4.

CHANGE OF CIRCUMSTANCES.

See BONUS TO RAILWAY COMPANY.

CHANGE OF POSSESSION.

See SALE OF GOODS, 1.

CHARGING ANTICIPATED PURCHASE MONEY.

See EQUITABLE ASSIGNMENT.

CHATTEL MORTGAGE.

The plaintiff sued for conversion of certain "withes lying on the island in the mouth of the river Moira, " claimed by him under a written instrument, not under seal, whereby A., the owner, assumed to assign the withes to the plaintiff, as security for money lent. The defendants asserted a lien on the withes for advances to A., and also alleged that there had been an actual delivery thereof to them, under which they had taken possession prior to the plaintiff's mortgage.

Held, that the instrument was a good mortgage, though without seal, and was not void for want of registration as against the defendants claiming under the alleged prior delivery. The alleged lien for advances could not be enforced against the plaintiff, who was found by the jury to be an innocent mortgagee for value; and the jury having, upon contradictory evidence, found against

the alleged prior delivery, the refusal of the judge of the County Court of Hastings to disturb the verdict was affirmed.

Paterson v. Maughan, 39 U.C. R. 371, approved of and followed.—*Hall v. Collins' Bay Rafting and Forwarding Co.*, 67.

See also FRAUDULENT PREFERENCE.

CHATTEL MORTGAGE ACT.

See WAREHOUSE RECEIPT.

CHATELS, SALE OF.

See WITHDRAWING CASE FROM JURY.

CITY BY-LAW.

See REMOVAL OF BUILDING.

CLAIM.

See PAYMENT IN ADVANCE.

COILED WIRE SPRING.

See PATENT OF INVENTION, 2.

COMPENSATION.

See CROWN GRANT.

CONDITIONAL PAYMENT.

See DEFENCE.

CONDITION AGAINST LIABILITY.

See CARRIERS.

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CONDITIONS OF POLICY.

See FIRE INSURANCE, 3.

CONSIDERATION, FAILURE OF.

See PAYMENT IN ADVANCE.

CONTRACT.

See LORD'S DAY ACT—PAYMENT IN ADVANCE.

CONTRACT FOR SALE OF TIMBER.

M. contracted to deliver timber of a certain kind to the defendant at St. Ignace, which to the knowledge of M. was intended to be transported by the defendant to Quebec for sale there. Part only of the timber was delivered, and in an action by M.'s assignee for the price thereof, the defendant counter-claimed for damages for non-delivery of the residue. There was no market for such timber at St. Ignace, or at any place nearer than Quebec.

Held [affirming the decision of the Queen's Bench Division, 3 O. R. 603], that the market value of the timber at Quebec, less the cost of transportation, was the true measure of damages.—*Hendrie v. Neelon*, 41.

CONTRACT, EVIDENCE OF.

See SPECIFIC PERFORMANCE, 1.

CONTRACT OF SALE.

See EQUITABLE ASSIGNMENT.

CONTRIBUTORIES.

See WINDING UP COMPANY, 1, 2.

CONTRIBUTORY NEGLIGENCE.

See RAILWAY COMPANY, 2.

CORPORATION.

An appeal from the judgment of ROSE, J., (not reported) dismissing an application under 46 Vict. ch. 18, sec. 535 (O.), for a mandamus to compel the repair by the county of Haldimand of an existing bridge, or the construction of a new one over the Oswego Creek, where it crosses the boundary line between the townships of Moulton and Canborough, by reason of the judges of this court being divided in opinion, was dismissed.

Per HAGARTY, C. J. O., and OSLER, J. A.—Indictment was the appropriate remedy. The court below had the right to grant the writ in its discretion, which was, however, properly exercised in refusing it.

Per BURTON and PATTERSON, JJ. A.—The duty under the statute is not the general obligation to keep highways and bridges in repair, but is a specific duty like that cast upon railway companies by their charters with respect to the restoration of roads or the building of bridges. The existence of liability to indictment does not of necessity exempt from compulsion by mandamus any party charged by statute with a specific duty. Indictment would in this case be neither a specific nor an adequate remedy, and a mandamus should have been granted.

The demand made upon the county council previous to the application was sufficient.

Per OSLER, J. A.—The demand was insufficient.

Per Curiam.—The county council were liable for the non-repair of the bridge in question.—*In re The Corporations of the Townships of Moulton and Canborough and the Corporation of the County of Haldimand*, 503.

COSTS OF FIRST EXECUTION CREDITOR.

See CREDITORS' RELIEF ACT.

COUNTY COURT, JURISDICTION OF.

See DISTRAINING CATTLE, &c., 4.

COUNTY JUDGE, PROHIBITION TO.

See PROHIBITION, &c.

COURT OF REVISION.

See ASSESSMENT.

COVENANT NOT RUNNING WITH LAND.

See PARTY WALL, &c.

CREDITORS' RELIEF ACT.

Held, [affirming the judgment of the County Court of Perth] that the

creditor under whose execution an amount in the hands of a sheriff for distribution under the "Creditors' Relief Act, 1880," was levied, and which was insufficient to pay all claims in full was not entitled to priority of payment of the costs of obtaining judgment and execution. *Porteous v. Myers* 85.

CROWN GRANT.

The plaintiff, who was *cestui que trust* of certain lands held by B. & P. under a settlement which provided against anticipation, became a party to an instrument, in which B. & P. were named as parties, but did not execute, which, amongst other things declared that B. & P. had no real interest in certain lands which had been allotted to and were subsequently granted to them by a patent from the Crown, in which they were described as trustees for the plaintiff, for the purpose of making compensation for a deficiency in the settled estate; and that the person really entitled to such compensation was her husband, G.W. F. Subsequently B. & P. executed a similar declaration, and afterwards G.W. F. joined with them in a conveyance of these lands to a *bona fide* purchaser (E.), under whom the defendants claimed.

Held, [affirming the judgment of BOYD, C., GALT, J., dissenting;] (1) That the lands granted as compensation were subject to the terms of the settlement: (2) That the plaintiff's declaration in favor of her husband was inoperative in face of the restraint upon anticipation; and (3) that the terms of the grant from the Crown were sufficient to put E. on inquiry, and that he and the defendants must be taken to have had

notice of the settlement, and plaintiff was therefore entitled to recover.

Per GALT, J.—The patent granting the compensation described B. & P. as trustees of the plaintiff, but did not grant the lands to them as such, and it could not be assumed, in the face of the declarations as to the title of G.W. F., that the plaintiff was the party entitled to such compensation. *Foot v. Rice*, 4 O.R. 94, affirmed. *Foot v. McGeorge*, 351.

See also WATER LOTS.

CROWN LOCATEE.

See RAILWAY COMPANY, 2.

DAMAGES, MEASURE OF.

See BONUS TO RAILWAY COMPANY
—CONTRACT FOR SALE OF TIMBER.

DEBENTURES.

See BONUS TO RAILWAY COMPANY.

DECEIT, ACTION OF.

See MISREPRESENTATION IN FORMATION OF COMPANY.

DEFECT IN QUALITY.

See SALE OF GOODS 4.

DEFENCE.

The defendant stated in his defence that in case the court should

be of opinion that he was liable for the payment of the balance, &c., he, the defendant, brought into Court the sum of \$4,300, saying that the same was sufficient to pay in full all claims of the plaintiff in respect of the balance, &c., ; and paid into Court under his defence the said sum of \$4,300, which was withdrawn by the plaintiff after issue and before trial.

FERGUSON, J., although he held that the plaintiff was not entitled to recover, refused to order him to refund the \$4,300.

An appeal from such refusal was dismissed with costs as the result of a division of opinion.

Per HAGARTY, C. J. O., and OSLER, J. A.—There was only one way in which this money could have been paid into Court, unless under a special order, viz., under Order XXVI. O. J. A. ; the money was not paid in conditionally, but absolutely in satisfaction and as an alternative defence ; and therefore it was properly withdrawn by the plaintiff.

Per BURTON and PATTERSON, JJ. A,—The defence of payment into Court set up was not strictly pleadable, but was a notice to the plaintiff that the money was in Court to answer his demand, if he established it. Money paid into court under a defence is not inevitably to be regarded as paid in under Order XXVI. O. J. A. The inference that payment into court is made for immediate satisfaction, must yield to a direct notice that it is not made for that purpose ; and such notice sufficiently appearing from the pleading, the money was improperly withdrawn by the plaintiff. *Bell v. Fraser* 1.

DEFICIENCY IN LAND.

See CROWN GRANT.

DELAY.

See BONUS TO RAILWAY COMPANY.
— MISREPRESENTATION IN FORMATION OF COMPANY.

DELIVERY.

See CHATTEL MORTGAGE—DONATION MORTIS CAUSA.

DELIVERY OF POSSESSION.

See WITHDRAWING CASE FROM JURY.

DEMAND OR NOTICE BEFORE ACTION.

See MONEY PAID UNDER MISTAKE OF FACT.

DEMURRER.

See LIBEL.

DETENTION.

See REPLEVIN.

DISCLAIMER.

It is not essential to the validity of a disclaimer that it should be by deed or by record.—*Moffatt v. Scratch*, 157.

DISCRETION.

See SECURITY FOR COSTS.

DISTRAINING CATTLE DAMAGE FEASANT.

1. The defendants, by an agreement under seal with one S., acquired a right of user in certain land for the purpose of pasturing their cattle. There was no demise, or right of distress, or anything in the agreement to make the defendants tenants of S. There was, however, a covenant that S. would not allow his own animals, or those of others to enter upon the land in question.

Held, that the defendants had no right, under this agreement, to distrain the plaintiff's cattle damage feasant upon the land: *Graham v. Spettigue et al.* 201.

2. *Semble*, the defendant's remedy (if any) was by action on the covenant against S.: *Ib.*

3. A distraint of cattle damage feasant cannot be supported unless the cattle are taken at the time the damage is done; if they are driven out after doing damage they cannot be seized on their re-entry for the former damage: *Ib.*

4. The question whether S. gave the defendants such an interest in the land as entitled them to impound the cattle is not a question of title in the sense that it would oust the jurisdiction of a county court: *Ib.*

DISTRIBUTION.

See CREDITORS' RELIEF ACT.

DIVISIONAL COURT.

See INTERPLEADER ISSUE.

DONATIO MORTIS CAUSA.

A verbal gift of personal chattels does not confer any property on the donee, if there be no actual delivery to him: Therefore where the mother of the defendant, while on her death bed, gave to her son, J., the key of a drawer containing a mortgage in her favor executed by the defendant, directing J. to give the instrument to the defendant in the event of her not again seeing him, and the defendant was subsequently summoned by telegraph to see his mother, and he thereupon again visited her, when she told him that his mortgage was in the drawer, and that when he went he should take it with him; but he did not on this occasion take possession of or see it. After the mother's death (intestate) J., as recommended by her, handed the mortgage to the defendant,

Held, [affirming the judgment of *Boyd, C.*, 8 O. R. 516] that there had not been such a complete delivery of the security as to constitute a gift *inter vivos* or a *donatio mortis causa*, and therefore that the money due on the mortgage formed part of the personal assets of the deceased.

Watson v. Bradshaw, 6 A. R. 656, observed upon. *Travis v. Travis*, 438.

DOWER [NOT ASSIGNED.]

See MARRIED WOMAN.

EASEMENT.

See WATER LOTS.

EJECTMENT.

In an action of ejectment the plaintiff claimed title under F., a grantee of S., the assignee in insolvency of P. D., who formerly owned the land, and who some years before his insolvency had conveyed the land to his brother, L. D.; S., under the advice of the inspectors of the estate refused to take proceedings to set aside the conveyance to L. D., as fraudulent, and two of the creditors, under the provisions of sec. 68 of the Act, having obtained leave from the insolvency judge, instituted a suit in the name of S. and procured a decree declaring the conveyance to L. D. fraudulent and, as against S., void. The decree did not direct a sale of the land, as was prayed. The land was, however, advertised for sale, the period of advertisement being shortened by the judge, and was sold to F.; S. under instructions from the general body of creditors, at first refused to convey to F., but subsequently conveyed upon an order being obtained from the judge directing him to do so.

Held, [affirming the decision of the Common Pleas Division, 9 O. R. 89] that the sale was not one subject to the control of the general body of creditors, and therefore that the restrictions of sec. 75 of the Act were inapplicable, and the sale was valid.

Held, also, that the defendant failed to establish his claim of title by possession. *Donovan v. Herbert* 298.

[Affirmed in Supreme Court]

EQUITABLE ASSIGNMENT.

While the defendants C. and E. were negotiating with the defendant

J. for the purchase of his stock of goods, the plaintiffs presented to C. and E. an order upon them for part of the anticipated purchase money, which order they had obtained from J. in payment of a debt due by him to the plaintiffs. This order C. and E. refused to pay or accept. The sale was subsequently completed, and the price paid in full to J.

Held, that no charge on the purchase money had thus been created, and payment therefore could not be enforced against C. and E.

Mitchell v. Goodall, 5 A. R. 164, and *McMaster v. Garland*, 8 A. R., 1, observed upon and explained.—*Brown et al. v. Johnston et al.*, 190.

EXECUTION CREDITOR,
COSTS OF FIRST.

See CREDITORS' RELIEF ACT.

EXECUTION UNDER 40 VICT.
CH. 43 (D.)

See FOREIGN JUDGMENT.

FAILURE OF CONSIDERA-
TION.

See PAYMENT IN ADVANCE.

FENCES, LIABILITY OF RAIL-
WAY COMPANIES TO
CONSTRUCT.

See RAILWAY COMPANY, 1, 2.

FIERI FACIAS.

See MARRIED WOMAN.

FIFTH STATUTORY CONDITION.

See FIRE INSURANCE, 2.

FINDINGS BY JUDGE OR JURY.

See JUDGE OR JURY—SALE OF GOODS, 2.

FIRE INSURANCE.

1. *Held*—[Affirming the decision of the Queen's Bench Division, 7 O. R. 64]—That the plaintiff was entitled to recover under a policy of insurance against fire, damages resulting from *bond fide* efforts to save the insured property by removal.—*McLaren v. Commercial Union Assurance Co.*, 279.

2. *Quære*, whether the fifth statutory condition, which declares that in case of removal of property to escape conflagration the company will ratably contribute to the loss and expenses attending such act of salvage, creates an independant obligation upon the company to contribute ratably over and above the amount insured as for direct loss.

Per BURTON, J.A.—The fifth statutory condition does create such obligation. *Ib.*

3. The fire insurance policy sued on contained a condition that any action upon it should be barred "unless commenced within the term of six months next after the loss or damage shall have occurred."

Held, [affirming the decision of BOYD, C.] that this condition must be considered to refer to the date of the destruction by fire, and not to the date at which the cause of action arose.

Semble, per HAGARTY, C. J. O.—The six months' limitation was an unreasonable one, as another condition provided that the insurance company should have sixty days for payment after completion of proofs of loss.—*Peoria Sugar Refining Co. v. Canada Fire and Marine Insurance Co.*, 418.

FOLLOWING MONEYS FRAUDULENTLY OBTAINED.

See PROMISSORY NOTE.

FOREIGN JUDGMENT.

In an action under 40 Vict. ch. 43, sec. 47 (D.), brought in Ontario against a shareholder there resident, of a company whose head office was in another province, where judgment had been obtained by the plaintiff against the company, and execution thereon had been returned unsatisfied.

Held [reversing the judgment of ROSE, J., 7 O. R. 435], that the cause of action against the shareholder was complete without the return unsatisfied of an execution against the company in Ontario.—*Brice v. Munro et al.*, 453.

FRAUD.

See ASSESSMENT.

FRAUDULENT CONVEYANCE.

See EJECTMENT.

FRAUDULENT PREFERENCE

C., who was in insolvent circumstances, made a chattel mortgage of his stock in trade to the defendants M. & C., to secure a debt, and afterwards executed a general assignment to the defendant F. for the benefit of his creditors. The plaintiffs, who were simple contract creditors of C., and whose debts were not due, brought this action on behalf of themselves and all other creditors of C. except the defendants M. & C., to have the mortgage declared void under R. S. O. ch. 118.

Held, affirming the judgment of FERGUSON, J., that the mortgage was void under the said statute; that the plaintiffs could maintain the action, and that it was no objection that they did not include the mortgagees among the creditors, on whose behalf they professed to sue: *Longeway v. Mitchell*, 17 Gr. 190, followed.

Held, also, [BURTON, J. A., dissenting] that the circumstance that C.'s equity of redemption in the goods had been assigned to F. did not deprive the plaintiffs of the right to maintain the action to avoid the mortgage.

The goods having been sold by consent, pending the action, and the money paid into court, the judgment in the court below directed the payment out of the money to F., the assignee, for distribution by him under the trusts of the assignment. The judgment in this particular was varied on the ground that the goods had not passed to F. by the assignment, and the money was left to be dealt with by the court below on application of the parties claiming it.

Per BURTON, J. A.—C. having, before execution or any other process issued, conveyed his interest in

the property to F., there was no way by which a lien could be obtained upon the property by execution or otherwise, and any decree made must be fruitless, and the court should not make a decree which it was powerless to enforce.—*Macdonald et al. v. McCall et al.* 593.

See also INSOLVENT DEBTOR, 1, 2.

GIFT INTER VIVOS.

See DONATIO MORTIS CAUSA.

GOODS, SALE OF.

See SALE OF GOODS.

GOODS WAREHOUSED BY CARRIER.

See STOPPAGE IN TRANSITU.

GRANT FROM THE CROWN.

It is not essential to the validity of a disclaimer that it should be by deed or by record.

Where, therefore, on the 19th of June, 1818, a free grant or patent for 200 acres of Crown Lands was issued in favor of W., as daughter of a U. E. Loyalist, who shortly afterwards petitioned the Governor in Council, stating that the lands were granted to her by mistake and without her authority, whereupon an Order in Council was passed in 1820, allowing her to surrender them.

Held, [affirming the judgment of the Common Pleas Division, 8 O. R. 147, PATTERSON, J. A., dissenting,]

that the lands by reason of W. disagreeing to the grant, never passed out of the Crown, and were, therefore, by 50 Geo. III. ch. 7, and 6 Geo. IV. ch. 7, not liable to assessment, and a mistake of the Surveyor General, in not notifying the treasurer of the district of the surrender, could not make them liable, and therefore a sale for taxes was invalid.

Per PATTERSON, J. A.—The rule that acceptance is essential to the operation of an instrument cannot be applied to letters patent from the Crown. The lands having been described for patent and returned by the Surveyor General as assessable, were by virtue of such return assessable and saleable for arrears of taxes, without necessarily having regard to the true state of the title. *Moffatt v. Scratch*, 157.

See also CROWN GRANT.

GROWING CROPS, RIGHT TO.

See MORTGAGE, 1.

HUSBAND AND WIFE

See INSOLVENT DEBTOR, 1, 2.

ICY FORMATION ON SIDE-WALK.

See MUNICIPAL CORPORATIONS 2.

ILLEGALITY.

See LORD'S DAY ACT.

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INDEMNITY.

See PROMISSORY NOTE.

INDIA RUBBER SPRING.

See PATENT OF INVENTION 2.

INEFFECTUAL CONVEYANCE AN EVIDENCE OF CONTRACT.

See SPECIFIC PERFORMANCE 1.

INJURY TO OR LOSS OF GOODS IN REMOVAL

See FIRE INSURANCE, 1.

INQUIRY.

See PAYMENT IN ADVANCE—TRUSTEES FOR RELIGIOUS BODY.

INSOLVENT ACT.

See EJECTMENT.

INSOLVENT DEBTOR.

1. The plaintiffs having a claim against the Hamilton Knitting Company, pressed the company for payment of their demand or security therefor. All parties were conscious that the company was insolvent and could not carry on their business, but would have to make an assignment unless they obtained an extension of credit from the plaintiffs, on getting which their manager

stated that "he could carry the concern along." On the suggestion of one of the plaintiffs, the company agreed to give a mortgage on their works, &c., but as it was the opinion of all that the company could not give a mortgage to secure a pre-existing debt, it was arranged that a simulated loan should be effected by the plaintiffs to the company, nearly the whole of which should be applied to the payment of the plaintiff's claim; and such an arrangement was carried out accordingly. On a proceeding instituted to impeach this mortgage, Boyd, C., held the transaction a fraudulent preference under R. S. O. ch. 118, (7 O. R. 154), and an appeal from that judgment, owing to an equal division of the Judges in this Court, was dismissed with costs. *Long et al. v. Hancock* 137.

2. In an action impeaching the transfer of certain notes by an insolvent trader to his wife, the husband swore such transfer was made to secure her the payment of moneys loaned by her. Immediately after such transfer he absconded from the Province. At the trial the jury found, in answer to questions put by the presiding Judge, (1) that the husband at the time he absconded was not solvent, and able to pay his debts in full; (2) that he knew himself at the time to be on the eve of insolvency; (3) that the transfer of the notes to his wife was not voluntary; (4) that the scheme of such transfer originated with him and not with his wife. The jury, however, failed to find with what intent the transfer was made, and gave a verdict in favor of the defendant (the wife), which, on motion in term, the judge refused to disturb.

On appeal this court, being of opinion that the answers given by the jury did not afford sufficient ground for a decision under ch. 118, R. S. O., ordered a new trial, but under the circumstances directed each party to bear their own costs, both of the appeal and of the new trial. *Fradenburgh v. Haskins* 257.

INSPECTION, PLACE OF

See SALE OF GOODS 3.

—, PURCHASE BY.

See SALE OF GOODS, 4.

INTEREST.

See ASSIGNMENT FOR CREDITORS.

INTERLOCUTORY ORDER.

See INTERPLEADER ISSUE—SECURITY FOR COSTS.

INTERPLEADER ISSUE.

A motion to quash an appeal to this Court from the judgment of FERGUSON, J., (9 O. R. 314), upon the trial of an interpleader issue, on the ground that the decision was interlocutory, and not appealable under sec. 35, O. J. A., was dismissed without costs, the members of the Court being divided in opinion.

Per HAGARTY, C.J.O., and OSLER, J. A.—The decision in question was an interlocutory order within the meaning of sec. 35, O. J. Act, and

one from which there would have been no relief before the passing of the O. J. Act by a direct appeal to this Court, and sec. 35 precludes such an appeal under the O. J. Act, though there is the right to have the order reheard by a Divisional Court, and an appeal lies from the order on rehearing, which is not less interlocutory than the order at the trial, because an appeal lay in such case before the O. J. Act.

Per BURTON and PATTERSON, JJ. A.—The decision is a final adjudication on the question of property, and is only interlocutory in the sense of being a step in the interpleader proceedings, which, as a whole, are interlocutory with relation to the original action. But an appeal lay before the Judicature Act from the decision of an interpleader issue notwithstanding its interlocutory character. Therefore this decision, being the decision of a Judge in Court, is appealable under section 37 and is not within the restriction of section 35.

Per Curiam.—Rule 510 does not give a right of appeal from the decision in question, for it is in terms limited to the trial of *actions*, and cannot be extended to the trial of interpleader issues.

Quære, *per* PATTERSON, J. A., whether the term “interlocutory” in section 35 is not used in the same sense as in 45 Vict., ch. 6, section 4, (O.) as denoting the character of the decision, and not the stage at which it is pronounced. *McAndrew v. Barker*, 7 Ch. D. 701 discussed; *Whiting v. Hovey* 119.

INVENTION.

See PATENT, &c.

JUDGE OR JURY, FINDINGS BY.

Remarks upon reversing the findings of a judge or jury upon a question of fact, or of mixed law and fact. *Scribner v. Kinloch et al.*, 367.

JUDGMENT AT TRIAL.

See INTERPLEADER ISSUE.

JUDGMENT IN EJECTMENT, RELATION BACK OF.

See MORTGAGE, 1.

JURISDICTION.

An objection to the jurisdiction exercised under R. S. O. ch. 42, secs. 15, 22, was not entertained, because there was nothing upon the proceedings to shew that the case was not tried before the proper judge.—*McKenzie et al. v. Dancy et al.*, 317.

See also REPLEVIN.

JURY.

See CHATTEL MORTGAGE, &c.

JUSTIFICATION.

See REPLEVIN.

LIBEL

In an action of libel paragraphs 3 and 4 of the defence set up that the

alleged libel was published on a privileged occasion; the ground of privilege being that it was a fair and *bond fide* comment upon a matter of public and general interest, which had become such by means of the plaintiff's own appeal to the public through the medium of the press, inviting public attention to his professional character and position, and challenging public criticism upon his conduct in connection with all the matters referred to in the alleged libel, which was printed and published by the defendant *bond fide*, for the public benefit, and without malice.

Held, [affirming the judgment of ROSE, J., 3 O. R. 53], a good defence.

Farmer v. The Hamilton Tribune Co., 3 O. R. 538, and *Murphy v. Halpin*, Ir. R. 8 C. L. 127, distinguished. — *Macdonell v. Robinson*, 270.

LICENSE TO REMOVE HOUSE.

See REMOVAL OF BUILDING.

LIEN.

See CHATTEL MORTGAGE, &c.

LOSS BY AGENT.

The plaintiff, an assignee of an insolvent estate, claimed from the defendant, a creditor of the estate, an account as to his dealings with timber limits assigned to him as security, and payment of any balance. Part of the timber had been placed in the hands of K. & Co. for sale.

Held, upon the facts stated [affirming the decision of Ferguson, J.]—that the defendant was not liable for a loss occasioned by K. & Co.'s failure to pay over part of the price of the timber sold by them.—*Bell v. Fraser*, 1.

LOSS OF PROFITS.

See CONTRACT FOR SALE OF TIMBER.

MANDAMUS.

See CORPORATION.

MARRIED WOMAN.

The defendant's first husband died in 1870, and she contracted a second marriage in 1871. This action was before the Married Woman's Property Act, 1884, was passed.

Held [reversing the judgment of OSLER, J. A., 6 O. R. 581], that the defendant's right to unassigned dower in the lands of her first husband was not separate estate, but was property falling within R. S. O. ch. 125, sec. 3, and she not having the *jus disponendi* without her husband's concurrence her interest was not liable to be sold under execution against her.

Quære, per PATTERSON, J. A., whether a writ of *feri facias* is the appropriate remedy for reaching the separate property of a married woman.—*Douglas v. Hutchison* 110.

See also CORPORATION.

**MATURITY, TRANSFER OF
NOTE AFTER.**

See PROMISSORY NOTE, 3.

MEASURE OF DAMAGES.

See CONTRACT FOR SALE OF TIMBER.—MISREPRESENTATION IN FORMATION OF COMPANY.

MECHANICAL EQUIVALENT.

See PATENT OF INVENTION, 2.

**MISREPRESENTATION IN
FORMATION OF COMPANY.**

The plaintiffs, formerly owners of a line of steamers, filed the bill in this cause against the defendants, who were formerly owners of another line of steamers, seeking damages in respect of alleged misrepresentations on the part of the defendants as to certain contracts alleged by them to be held in connection with their line, and whereby the plaintiffs alleged they were induced to enter into an agreement with the defendants for the amalgamation of the two lines, and the formation in connection with the defendants of a joint stock company to own and run the same. The agreement was made in December, 1876, the charter of the company was obtained in March, 1877, and the plaintiffs became aware of the alleged misrepresentations in May, 1877; notwithstanding which they continued to carry on the business, allotted shares, and allowed dividends to be paid until and after the bill was filed, which was not till February, 1881. The

cause was not brought to a hearing till May, 1884, and one of the defendants died while it was pending. The evidence as to the alleged misrepresentations was conflicting.

Held, that this was in effect a common law action of deceit, and the misrepresentations alleged required proof of the clearest kind; and, therefore, that the long delay, the conduct of the plaintiffs, and their dealings with the subject matter disentitled them to relief upon the evidence submitted.

Semble, if the plaintiffs had succeeded, the measure of damages would have been a portion of the profits of the contracts, as represented by the defendants, proportioned to the plaintiffs' shares of the capital stock of the company.

Per HAGARTY, C.J.O.—The action was wrong in its framework; it should have been brought in the name of the company, or on behalf of all its shareholders.

Per BURTON, J.A.—The action could not have been maintained by the company upon representations made to the plaintiffs.—*Beatty et al. v. Neelon et al.*, 50.

**MONEY* FRAUDULENTLY
OBTAINED, FOLLOWING.**

See PROMISSORY NOTE, 2.

**MONEY PAID UNDER MIS-
TAKE OF FACT.**

The plaintiffs ordered goods from the defendant in Montreal to be shipped to them in Toronto, and three several consignments were made, one of which having been addressed to "J. H. C. & Co.," instead of "H. E. C. & Co.," never

reached the plaintiffs, but was, after remaining eighteen months in possession of the carriers, in due course sold for payment of the charges thereon. The defendant drew on the plaintiffs for the amount of the invoices of the three consignments which the plaintiffs in ignorance of the non-receipt of the third consignment accepted and paid. Subsequently the plaintiffs discovered their error and demanded a return of the amount paid, which the defendant refused.

Held, that although the plaintiffs had had the means within reach during all this time of ascertaining the true position of matters, there was no duty cast on them in relation to the defendant which made their delay in discovering the mistake laches on their part, and that they were entitled to recover back the amount paid as money paid under a mistake of fact.

Sembla.—A demand of repayment or notice to payee of the mistake is necessary before action.—*Clark v. Eckroyd*, 425.

MORTGAGE.

C., being in default on his mortgage of realty to the plaintiffs, in April, 1882, gave them a chattel mortgage, in consideration of which they agreed to allow him to remain in possession and take the year's crop.

On the 2nd July, 1882, the plaintiffs took formal possession of the land.

On the 17th July, 1882, the defendant, having obtained judgment against C., placed a *fi. fa.* in the hands of the sheriff, who seized the growing crops on the land in ques-

tion on the same day, and sold them in August.

The plaintiffs had commenced ejectment proceedings on the 12th June, and they signed judgment on the 30th September, in the same year.

The plaintiffs claimed the crops, and an interpleader issue was tried.

Held, [affirming the judgment of the Common Pleas Division, 5 O. R. 371] that the defendant had the right on the 17th July, by virtue of the agreement made in April, to seize the crops as C.'s property; and the seizure and sale having taken place before the judgment in ejectment, the rule that the judgment related back to the day of the commencement of the action, so as to make C. himself a trespasser from that date, could not avail the plaintiffs.—*Hamilton Provident and Loan Society v. Campbell*, 250.

See also PROMISSORY NOTE.

MUNICIPAL CORPORATIONS.

1. By a special act of the Legislature of Ontario, 45 Vict. ch. 45, provision was made for the construction of a subway or subways as a means of crossing certain railways entering the City of Toronto, part of which had to be constructed within the city, and part within the adjoining municipality of the Village of Parkdale, and in consequence of a disagreement between the city and the village as to the terms upon which the undertaking should be proceeded with, the latter united with the railway companies in obtaining an order in Council under the Dominion Act, 46 Vict. ch. 24, authorising the companies to execute the work, and the

latter entered into an agreement with the village authorities that they should construct the same, which they proceeded to do. In an action against the village brought by the holders of property in the city and village, which was greatly damaged by the mode of executing the work.

Held, [reversing the judgment of the court below.—HAGARTY, C. J. O., dissenting,] that the municipality was not answerable for any damage caused by the works.

Per HAGARTY, C. J. O.—The defendants could not legally undertake the work merely as the agent of the railway companies, and can only be treated as principals; the plaintiffs are entitled to a reference as to the compensation to be awarded to them.

Per BURTON, J. A.—When the council of a corporation professing to act under the authority of the corporation does acts which are injurious to others, if the objects and purposes which they propose to accomplish are not within the scope of the corporate duty imposed on it by them, the corporation is not liable. What the corporation attempted to do here was not to put in force any of the corporate powers of the municipal body, but the powers supposed to be possessed by the railway companies, and for this reason they are not liable,

Per OSLER, J. A.—If the defendants could act as agent of the railway companies they can defend themselves just as an individual could do under the authority of the Railway Act and Order in Council; if they could not so act it is equally open to them to defend themselves from liability as a corporation, and either way the plaintiffs fail.—*West v. The Corporation of the Village of Parkdale*, 393.

[Reversed in Sup. Court.]

2. The plaintiff, a resident inhabitant of the Town of Prescott, whilst proceeding along one of the sidewalks of the town attempted to cross from one side of such walk to the other over an accumulation of hard beaten snow, where there was a slight declivity in the sidewalk, and in doing so slipped and fell, thereby injuring herself.

Held, [reversing the judgment of the Q. B. D. 7 O. R. 261,] that there was no proof of such accumulation of snow as indicated negligence on the part of the defendants, and there being no evidence of negligence in the construction of the sidewalk the corporation was not liable.—*Bleakley v. The Corporation of Prescott*, 637.

NAVIGATION, INTERFERENCE WITH.

See WATER LOTS.

NEGLIGENCE.

See MUNICIPAL CORPORATION, 2.

NEGLIGENCE OF PAYER OF MONEY UNDER MISTAKE OF FACT.

See MONEY, &c.

NON DELIVERY.

See CONTRACT FOR SALE OF TIMBER.

NOTICE.

See CROWN GRANT.

NOTICE OF ACTION.

See MONEY PAID UNDER MISTAKE OF FACT.

NOTICE, PRESENTMENT AND WAIVER OF.

See PROMISSORY NOTE 1.

NOVELTY, WANT OF.

See PATENT OF INVENTION, 1.

OCCUPANTS.

See RAILWAY COMPANY, 1, 2.

OCCUPIED LAND.

See RAILWAY COMPANY, 2.

ORGANIZATION OF RELIGIOUS BODY.

See TRUSTEES, &c.

OWNER.

See PROHIBITION TO COUNTY JUDGE.

OWNER OR CONTRACTOR.

See REMOVAL OF BUILDING.

PARTNERSHIP.

See ASSIGNMENT FOR CREDITORS.

PARTY WALL, AGREEMENT TO PAY FOR.

C. and the defendant were owners of adjacent lots, and C. being about to build on his lot agreed by writing under seal to erect a party-wall on the dividing line, and equally on both lots, defendant agreeing to pay for the half of the front forty feet thereof when erected, and for the rear portion whenever defendant should require to use it. Subsequently C. sold and conveyed his lot to the plaintiffs in fee by deed containing the usual statutory covenants. Some years later defendant erected a building on his lot, making use of the rear part of such party-wall, by reason of which he became liable to pay \$98.65 and interest therefor, and did accordingly pay the same to C. In an action by the plaintiffs, as assignees of C.'s interest in said land, against the defendant to recover the sum so due in respect of such wall.

Held, that the plaintiffs were not entitled as vendees of C. to recover: the right to payment of the sum stipulated to be paid for the wall under the covenant with C. not having passed under the conveyance by C. to the plaintiffs.—*Kenny v. Mackenzie*, 346.

PATENT OF INVENTION.

1. A patent for a horse rake, the specification of which described as part of the invention, "the construction and novel arrangement of a divided axle, with wheels firmly fastened thereon, a friction grip for engaging with the divided axle, &c.; the description of the construction and operation stating that "the axle being divided in two parts, per-

mits the wheels to turn in opposite directions ; a piece of iron or steel wire, or cord, or chain, is coiled round each half of the axle, one end of each coil being secured firmly to the rake head, while the other ends of the coil are secured to a foot treadle," &c.

Held, not to be infringed by a rake worked by a strap passed twice or oftener round the inner part of the hub of the wheel elongated for the purpose of receiving it, one end of the strap being attached to the axle, and the other connected with the treadle.

Held, also, that the mode of using the cord was not novel, being essentially the same described in an earlier patent as consisting of "flexible metallic straps which encircle the inner extension of the hubs, one end of each strap being attached to a fixed bearing secured to the axle, and the other to the short end of a lever," &c.

Semble, that neither the circle nor the coil was the subject of either invention, but only modes of using a friction band in connection with another device which was the patented improvement.

Per HAGARTY, C. J. O.—It was not patentable. *Sylvester v. Masson et al.*, 335.

2. The plaintiffs, the holders of a patent for "an elastic gore, gusset, or section * * springs arranged in groups and made of a continuous length of coiled wire," sought to restrain the defendants from using a colorable evasion of this patent in the manufacture of corsets.

Held, [affirming the judgment of the court below] that the substitution of coiled wire springs for india rubber springs, which had been previously used, was a mere mechanical

equivalent for the rubber springs, and therefore not a subject for a patent. *Ball et al. v. Crompton Corset Co. et al.*, 738.

PAYMENT IN ADVANCE.

The defendant, having delivered ties to a railway company in excess of his contract, as he alleged, arranged that such ties should be returned as received by the company on a contract with the plaintiff. In anticipation of such returns, and of payment therefor, the plaintiffs paid the defendant \$1,000, and brought this action to recover the same, and alleging that he never was able to procure returns or payment from the railway company, and that the consideration of the \$1,000 had therefore failed. It was shewn in evidence that the plaintiff had, in a claim against the railway company for 19,883 ties, included 3,260 delivered by the defendant, and that, the railway company disputing such claim, a settlement had been effected the plaintiff accepting \$1,000 in full of his claim, and giving the company a formal release of all demands.

Held, that, to the extent to which the ties were delivered by the defendant on plaintiff's account, the latter could not, in view of the circumstances, allege failure of consideration: but that he was not bound by the settlement to pay for ties that were not delivered, and therefore that the determination of the action depended upon the result of the inquiry directed as to the number of ties delivered by defendant; and an appeal from the judgment directing such inquiry was accordingly dismissed.

The objection, that the Judge at the trial should have himself decided

the issue as to failure of consideration, instead of directing an inquiry before the Master, is not one that the Court will entertain. *Featherstone v. VanAllen*, 133.

PAYMENT INTO COURT.

See DEFENCE.

PLAN, AMENDING.

See PROHIBITION TO COUNTY JUDGE.

PLEADING

See LORD'S DAY ACT.

POLICY, CONDITIONS OF.

See FIRE INSURANCE, 3.

POSSESSION, ATTEMPT TO TAKE

See BILL OF SALE.

POSSESSION, CHANGE OF.

See SALE OF GOODS, 1.

POSSESSION, CONTINUOUS.

See WITHDRAWING CASE FROM JURY.

POSSESSION, TITLE BY.

See EJECTMENT.

PRACTICE.

Conmee and McLennan became contractors for the construction of a section of the Canadian Pacific Railway, the agreement therefor stipulated that 90 per cent. of the work should be paid for during the progress thereof upon "the progress estimates" of the proper officer of the company, the remaining 10 per cent. to be paid on the completion of the contract, at which time the company alleged that they had discovered that by means of fraud the contractors had procured from their engineer progress estimates for sums greatly in excess of the work done, and they claimed for overpayments about \$600,000.

The contractors, on the 5th of October, 1885, sued out process in the Queen's Bench Division to recover \$200,000, the balance claimed by them as still due on the contract; and on the 31st of the same month the company sued out process in Chancery Division against the contractors to enforce payment of the amount claimed to have been overpaid them. Issue was joined in the actions respectively on the 17th and 14th of November following. In the action in the Chancery Division the contractors gave notice for trial by a jury, which, on application by the company, was struck out by the master in Chambers, who also made an order refusing a motion made by the contractors to stay proceedings in the Chancery Division action until the determination of the questions in the other actions. Thereupon the contractors appealed, and on argument before Boyd, C., their appeal was dismissed.

The company moved for and obtained an order from the master in Chambers to stay all proceedings in

the Queen's Bench Division action with liberty to the contractors to raise in the Chancery Division action by defence, set off, counterclaim, or otherwise, all questions intended to be raised by them in the Queen's Bench Division action against which order the contractors appealed to ROSE, J., who, feeling bound by the decision of BOYD, C., affirmed the order of the master.

Held [reversing these orders] that the Court of Appeal had jurisdiction to entertain the appeals, and that a trial with a jury was the *prima facie* right of the contractors whose action was the earlier one, and that the orders complained of were not such as rested in the mere discretion of the Judge. [HAGARTY, C.J.O., *hesitante*.]

Per OSLER, J.A., even if the facts were such as would entitle the Judge at the trial to strike out the jury notice, the present orders were premature.—*Conmee v. Canadian Pacific R. W. Co.*, and *The Canadian Pacific R. W. Co. v. Conmee*, 744.

PREFERENCE.

See ASSIGNMENT FOR CREDITORS.

PRESENTMENT AND NOTICE, WAIVER OF.

See PROMISSORY NOTE.

PRINCIPAL AND AGENT.

See MUNICIPAL CORPORATIONS.

PRIVATE OR PROFESSIONAL CHARACTER.

See SOLICITOR.

PRIVILEGE.

See LIBEL.

PROFITS, LOSS OF.

See CONTRACT FOR SALE OF TIMBER.

PROHIBITION TO COUNTY JUDGE.

Held, [reversing the judgment of PROUDFOOT, J., 9 O. R. 274] that the status of C., as a person, or the assignee of a person, who registered a plan, was a question of law and fact combined for the County Judge to determine upon C.'s application to him, under R. S. O. ch. 111, sec. 84, to amend the plan, and that his decision was not examinable in prohibition.

Sembla, a person not the owner of the property may register a plan, and although this would be at the time a futile proceeding, yet if he afterwards became the owner of the property and adopted the plan, he would be entitled under the Act to have it amended.—*In re Chisholm and the Corporation of the Town of Oakville*, 225.

PROMISSORY NOTE.

1. A promissory note was dishonored at maturity, but was not protested by the holders (a banking corporation) because of a waiver by the indorsers of presentment and notice.

Held, that the indorsers were not liable to pay interest thereon as a debt. Nor could a contract to pay interest be deduced from a usage of banks to charge interest on overdue debts, and to collect it if possible.

at D's own risk, and without damage to that or any other property. Both defendants contemplated and intended that the house was to be drawn and moved along Sherbourne street for some distance. Under a by-law of the city, all persons were prohibited under a penalty from moving any building into, along, or across any street without the written permission of the board of works. In this case no such permission was obtained, and in the course of hauling the building along the line of the track of the plaintiffs one of the sills was upset, thus preventing its further removal for two days, during which time the plaintiffs sustained loss by the non receipt of fares and damage to their property.

Held [BURTON, J. A., dissenting] that Jefferys, as well as Dollery, was liable for the loss so occasioned.

Per OSLER, J. A. As the plaintiffs had, by their charter, the superior right of user and occupation of the street, a duty was cast upon J. to see that proper precautions were taken to prevent injury arising from obstructing the railway by means of the building of which he was procuring the removal, and which could not from its size be removed along the street without obstructing the traffic. *Toronto Street Railway Company v. Dollery and Jefferys* 679.

REPAIR [OF BRIDGE.]

See CORPORATION.

REPLEVIN.

In an action of replevin brought in the County Court of Haldimand

for a mare taken by the defendants from the plaintiff's close in that county, removed to the county of Brant, and there detained until replevied.

Held, that the taking could not be justified under a warrant issued for the arrest of the plaintiff on a charge of stealing the mare; and although the original taking was justified under a search warrant issued in Haldimand to search the plaintiff's premises in Haldimand for the mare and to bring it before a justice of that county, yet the subsequent removal to the county of Brant and detention there were not, and constituted the defendant a trespasser *ab initio*, and therefore the County Court of Haldimand had jurisdiction to replevy the goods in Brant. *Hoover v. Craig and Hunter* 72.

REVISION, COURT OF.

See ASSESSMENT.

SALE OF GOODS.

1. An appeal from the judgment of the Queen's Bench Division in this case, reported 2 O. R. 265, by reason of the judges of this court being equally divided in opinion, was dismissed.

Per BURTON, J. A., and GALT, J.—The sale of the debtor's goods was not only accompanied by an immediate and complete delivery, but was followed by an actual and continued change of possession, and was therefore valid as against creditors under R. S. O. ch. 119, sec. 5.

Per PATTERSON, J. A., and ROSE, J.—The actual change which must immediately follow the sale is the

same change which must continue; and it could not be said to have been continued where the vendor apparently resumed his place in the shop containing the goods in question, one day after the sale, though in reality as clerk or salesman for the purchaser. — *Scribner v. Kinloch, et al.* 367.

2. Remarks upon reversing the findings of a judge or jury upon a question of fact or of mixed law and fact.—*Ib.*

3. The plaintiff contracted with the defendant, a dealer in lumber, to sell him 200,000 feet of 18 foot plank of red or white pine two inches thick and from six to twelve inches wide, "quality the same as he had supplied the previous year," to be paid for by acceptance at three months from dates of shipment. The lumber was to be shipped f. o. b., at the plaintiff's mills to such places as the defendant should direct. A shipment was made of some carloads which the defendant accepted. Subsequent shipments were made, some car loads of which were received and others rejected at Hamilton, where the defendant carried on business.

Held, in an action for the price, that under the terms of their contract the inspection should have been made at the plaintiff's mills, and [affirming the judgment of the court below] that the defendant could not reject the lumber at Hamilton unless it was shewn that the article delivered was not the article agreed to be delivered; and the evidence failed to shew that the description of the lumber mentioned in the contract was not substantially satisfied.

Per BURTON and OSLER, JJ. A. Although in a contract for the sale of goods not then ascertained, words

such as were here used as to quality would amount to a warranty that the article to be delivered should agree with that description there was not evidence to shew a breach of the contract in that respect: Therefore,

Held, that the defendant's only remedy was in damages for the inferiority of the article delivered.

Semble, per BURTON, J.A., assuming that the contract gave the purchaser the right of inspection and rejection at Hamilton, an acceptance and payment for one shipment would not preclude the defendant from rejecting subsequent shipments of the lumber that did not substantially answer the contract.—*Dyment v. Thomson*, 659.

4 The plaintiff, a fruit dealer in Ottawa, went to Montreal for the purpose of buying fruit, where he met the defendant, who had a quantity of apples for sale. The defendant, in answer to a question by one H., his agent, said they would be found to be "a good lot," and H. opened several barrels for the purpose of plaintiff examining the contents, which he did in five or six instances, when the apples "appeared to be good." The plaintiff might, had he so desired, have examined all the barrels; but having previously bought apples packed by the defendant which proved satisfactory, and placing reliance on the reputation of the defendant for being an honest packer, he refrained from any further examination, and purchased 138 barrels, which, on subsequently attempting to sell, proved to be so inferior in quality that parties refused to buy; others returning what they had bought. Thereupon the plaintiff instituted proceedings to recover compensation for the defect in value.

The judge of the County Court withdrew the case from the jury, and entered a nonsuit, which subsequently in term was set aside.

Held, on appeal, that as the sale was not a sale by sample, and the plaintiff had not been deterred by any acts or conduct of the defendant from making a full examination or inspection of all the barrels, the defendant was not liable on any warranty, expressed or implied, and that the maxim *caveat emptor* applied. — *Borthwick v. Young*, 671.

SAMPLE, PURCHASE BY.

See SALE OF GOODS, 4.

SATISFACTION.

See DEFENCE.

SCRUTINY OF VOTES.

[POWER OF COUNTY JUDGE TO ORDER.]

See TEMPERANCE ACT.

SECURITY FOR COSTS.

Held, [reversing the order of the Queen's Bench Divisional Court, 11 P. R. 9] that the plaintiff was not entitled to have delivered out to him, for cancellation, a bond for security for costs of the action after judgment in his favor by the Queen's Bench Divisional Court, before the time for appealing to this court had elapsed, and while an appeal was actually pending.

The order of the court below, even if interlocutory, was appeal-

able under the language of the Court of Appeal Act, and as the penalty of the bond was \$1,000, and the defendant's costs exceeded that amount, the sum in controversy was sufficient to warrant an appeal, and it could not be said that it was a matter so entirely in the discretion of the Court below that this Court would not interfere.

The right of appeal conferred by the Judicature Act considered.

Quære, per BURTON and PATTERSON, JJ. A., whether the order in appeal was interlocutory.

Quære, per OSLER, J. A., and GALT, J., whether sections 33 & 34 O. J. Act apply to appeals from interlocutory orders. *Hately v. The Merchants' Despatch Company et al.* 640.

SEPARATE ESTATE OF MARRIED WOMAN.

See MARRIED WOMAN.

SEPARATE ESTATE OF PARTNERS.

See ASSIGNMENT FOR CREDITORS.

SET OFF, AGREEMENT FOR.

See PROMISSORY NOTE, 3.

OF SOLICITOR'S FEES.

See WINDING UP COMPANY 2.

SETTLEMENT.

See PAYMENT IN ADVANCE.

SHAREHOLDER.

See FOREIGN JUDGMENT.

SIMPLE CONTRACT CREDITOR, ACTION BY.

See FRAUDULENT PREFERENCE.

SOLICITOR, ENFORCING UNDERTAKING OF.

The Court will not summarily compel a solicitor to perform an agreement or undertaking, merely because he is a solicitor; if it was not given by him in his professional connection with the suit or matter, the party to whom it is given will be left to his action.

Where M., a solicitor, unsuccessfully prosecuted a petition against the applicant at his own expense, in the name of one H., agreeing to indemnify H. against costs, M.'s interest being merely as surety on a bond for H., a summary application to make M. pay the costs of the petition was refused. — *Wilson v. Beatty—Re Donovan and Morphy*, 252.

SOLICITOR, FEES OF, SET OFF OF.

See WINDING UP COMPANY.

SPECIFIC PERFORMANCE.

C. verbally agreed with an agent of W. at Toronto to buy land in Manitoba, paying the agent ten per cent. of the purchase money, and taking his receipt therefor. C.

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signed the receipt as a witness, made an affidavit of execution, and registered it, in order, as he swore, to bind the bargain. The vendor's name did not appear in the receipt, but there was a reference in it to a telegram sent to the vendor, which was produced and shewn to be addressed to W. The plaintiff was the owner of the land, W. being merely his agent, but W. subsequently executed in his own name a conveyance of it to C., who also signed it.

Held, that the affidavit made by C., the receipt and the telegram could be read together, and when so read constituted evidence of a contract sufficient to satisfy the Statute of Frauds; and that the receipt could not be objected to as evidence because of a mistake in it as to the price, which was subsequently corrected in the deed.

Held, also, [affirming the decision of *FERGUSON, J.*, 8 O. R. 316] that the deed executed by W. was sufficient to satisfy the statute, although ineffectual as a conveyance. *McCarthy v. Cooper and Oliver*, 284.

See also BONUS TO RAILWAY.

STATUS OF APPLICANT.

See PROHIBITION TO COUNTY JUDGE.

STATUTE OF FRAUDS.

See SPECIFIC PERFORMANCE.

STATUTES.

R. S. O., c. 42, ss. 15, 22.]—*See* JURISDICTION.

R. S. O., c. 111, s. 84.]—See PROHIBITION TO COUNTY JUDGES.

R. S. O., c. 118.]—See ASSIGNMENT FOR CREDITORS — INSOLVENT DEBTOR, 1 — FRAUDULENT PREFERENCE—WITHDRAWING CASE FROM JURY.

R. S. O., c. 119.—See BILL OF SALE—SALE OF GOODS.

R. S. O., c. 125, s. 3.]—See MARRIED WOMAN.

R. S. O., c. 182.]—See FIRE INSURANCE.

O. J. A., s. 91.]—See CARRIERS.

O. J. A., order 26.]—See DEFENCE.

50 Geo. III. c. 7.]—See GRANT FROM THE CROWN.

6 Geo. IV. c. 7.]—See GRANT FROM THE CROWN.

36 Vict. c. 48, s. 23, (O.)]—See BONUS TO RAILWAY COMPANY.

36 Vict. c. 48, s. 248, (O.)]—See BONUS TO RAILWAY COMPANY.

40 Vict. c. 143, Sec (D.)]—See FOREIGN JUDGMENT.

41 Vict. c. 16.]—See TEMPERANCE ACT, CANADA.

45 Vict. c. 45, (O.)]—See MUNICIPAL CORPORATIONS.

46 Vict. c. 18, Sec 535 (O.)]—See CORPORATION.

46 Vict. c. 24, (D.)]—See MUNICIPAL CORPORATIONS—RAILWAY COMPANY.

STIPENDIARY MAGISTRATE.

See ASSESSMENT.

STOPPAGE IN TRANSITU.

The plaintiff sold to G. a quantity of leather, which was to be sent to the purchaser at P. by railway. The shipping bill contained, amongst

others, the following conditions: "In all cases * * the delivery of goods will be considered complete, and the responsibilities of the company shall terminate when the goods are placed in the company's shed or warehouse, * * when they shall have arrived at the place to be reached upon the railway of the company. The warehousing of them will be at the owner's risk," who was to be liable for any charges for storing them otherwise than in the warehouse of the company. "Storage will be charged on all freight remaining in the depots over forty-eight hours after its arrival."

While the leather remained in the warehouse of the railway company at P. the purchaser requested the station agent that it might be kept for him by the company until he could find time to remove it, and asked him not to charge storage, but the agent made no promise; and subsequently the sheriff paid the charges thereon, seized the leather under a writ of attachment sued out by the defendants, and removed the same from the stores of the railway company to the shop of G.

Held, that this did not deprive the vendor of his right to stop the goods *in transitu*.—*McLean v. Breithaupt et al.*, 383.

SUMMARY JURISDICTION.

See SOLICITOR, &c.

SURRENDER.

See GRANT FROM THE CROWN.

**SURVEYOR GENERAL'S
RETURN.***See GRANT FROM THE CROWN.*

TAKING.*See REPLEVIN.*

TAX SALE.*See GRANT FROM THE CROWN.*

TEMPERANCE ACT[CANADA]

On appeal the judgment of Rose, J., (9 O. R. 154), that a County Court Judge will not be compelled by mandamus to inquire on a scrutiny of ballot papers under sections 61, 62, and 63 of the Temperance Act of 1878, as to personation, bribery, or the status on the voters' list of the parties voting, was affirmed by this court, it appearing that the point was covered by a judgment of the Supreme Court of Canada in *Chapman v. Rand*, in which the judgment appealed from in this case was cited and approved of.—*Re Canada Temperance Act*, 677.

TITLE TO GOODS.*See WAREHOUSE RECEIPT.*

TITLE TO LANDS.*See DISTRAINING CATTLE, &c.*

**TRANSFER OF NOTE AFTER
MATURITY.***See PROMISSORY NOTE, 2.***TRANSITUS, TERMINATION
OF.***See STOPPAGE IN TRANSITU.*

TRIAL.*See LORD'S DAY ACT.*

**TRUSTEES FOR RELIGIOUS
BODY.**

In 1821 J. Bowerman and John Bull joined in conveying certain lands to three persons, trustees of the West Lake Meeting of Friends, appointed by the Monthly Meeting to secure the titles of meeting house lots, and burying grounds, "*to have and to hold said parcel of land hereby granted unto the aforesaid trustees of said Monthly Meeting for the time being, and for their successors in trust as said meeting shall from time to time see cause to appoint, for the only use and benefit of said meeting,*" and in 1835 Bowerman executed a further conveyance of a portion of those lands of which he had been the owner to two of the said trustees, "*and to their successors, in trust for said meeting so long as the members constituting it shall remain and be from time to time continued in religious unity with the Yearly Meeting of Friends (called Quakers) as now established in London, Old England, and no longer; habendum 'unto the aforesaid trustees of the said Monthly Meeting, and to their successors in trust for the time being as said meeting shall from time to time see cause to appoint, for the only use, behoof, and benefit of the said Monthly Meeting.'*"

The defendants contended that the identity of the existing Monthly Meeting with that described in these deeds had been lost by reason of departures from the principles which governed the Society of Friends at the time the trusts were created, as well in matters of discipline and practice as in points of faith and doctrine, and that the plaintiffs were consequently no longer entitled to the use and possession of the lands:

Held, [reversing the judgment of *PROUDFOOT, J.*, 7 O. R. 17,] that the criterion as to the Monthly Meeting was not the adherence to the doctrines and practices which prevailed at the time the trusts were created, but its continued existence as a Monthly Meeting of the organisation of the Society of Friends to which it belonged at those times, and possibly to its members continuing in religious unity with the London Yearly Meeting: and that the defendants, never having been recognised by or in connection with the Canada Yearly Meeting, had no rights as an organization which a court of law could recognise or enforce.—*Dorland v. Jones*, 543.

ULTRA VIRES.

See MUNICIPAL CORPORATIONS.

UNASSIGNED DOWER.

See MARRIED WOMAN.

VENDOR AND PURCHASER.

See SALE OF GOODS.

VESSEL.

See AGREEMENT.

WAIVER OF PRESENTMENT AND NOTICE

See PROMISSORY NOTE 1.

WAREHOUSE RECEIPT.

The execution debtors, C. & Son, bought the oats in question from persons who shipped them to Toronto, consigned to their (the seller's) own order or to the order of some bank other than to the plaintiffs; sending the shipping receipt with draft for the price of the oats attached to C. & Son at Toronto. The latter then took the shipping receipt to the plaintiffs who advanced the money thereon to pay the draft, returning the shipping receipt to C. & Son for the purpose of obtaining the oats from the carriers, after taking from C. & Son a receipt in these words:

"Received in trust from the Dominion Bank bill of lading for — bushels oats, and I hereby undertake to sell the property specified for said bank, and collect the proceeds of sale or sales thereof, and deposit the same with the said bank in Toronto, to the credit of same. I hereby acknowledging myself to be bailee of the said bank." C. & Son received the oats from the carriers and warehoused them, taking warehouse receipts in their own name, which they indorsed to the plaintiffs, who then gave up the bailee receipt.

Held, that the property in the oats had passed to C. & Son when the plaintiffs made the advance, and that the latter were therefore entitled at least as equitable owners, as

against execution creditors of O. & Son.

The Chattel Mortgage Act could have no application, for when the oats first came into the possession of O. & Son, they came charged with or subject to the plaintiffs' title.—*Dominion Bank v. Davidson et al.* 90.

WARRANT.

See REPLEVIN.

WINDING UP COMPANY.

1. The act of incorporation of the 'Alliance Insurance Company provided that no subscription to stock should be legal or valid until ten per cent. should have been actually and *bonâ fide* paid thereon. This company was amalgamated with the Standard Fire Insurance Company, and when the latter was being wound up the appellants were placed by the Master at Hamilton upon the list of contributories.

Held, that K., B., and O., C. & Co., who had subscribed for stock but paid nothing thereon, were improperly made contributories. *Re The Standard Fire Insurance Company. Kelly's case, Barber's case, Copp, Clark & Co's case*, 486.

WATER LOTS.

Held, [affirming the judgment of the Queen's Bench Division, 7 O. R. 706] that the plaintiffs claiming under a grant from the Crown to the City of Toronto, which gave a right to the city and its lessees to occupy and use for the purpose of stores and buildings, certain lots covered with water, which grant was

confirmed by legislation, had the right to build as they chose upon the lots, subject to any regulations which the city had the power to impose upon the lots, and in doing so to interfere with the rights of the public to navigate the waters.

The finding of the jury negating an easement contended for by the defendants, was also affirmed by this court.—*Warin et al. v. The London and Canadian Loan and Agency Company*, 327.

2. C. subscribed for stock on the condition that he should be appointed solicitor of the company. He was appointed as such, and received and retained in his possession for some years a share certificate, which stated that he was the holder of ten shares, on which \$100 had been paid. This was paid by giving him credit in the company's books for his charges to that amount for services rendered. He never repudiated the shares.

Held, that he was properly made a contributory. *Caston's case* 486.

WITHDRAWING CASE FROM JURY.

In an interpleader issue it was alleged that the plaintiff (the claimant) had purchased a horse from S. B. S., a married woman carrying on business in her own name, the price of which was said to have been paid partly in a note of hand of S. B. S. and her husband, for money lent to them, and partly by a set-off of wages coming to plaintiff from S. B. S. On the completion of the purchase the plaintiff took the horse, together with a cutter and harness belonging to S. B. S., and was absent for two or three days. On his return he put the horse in the stable

of S. B. S. as before, and fed it with her fodder, &c.—no other act was shewn to indicate a change of ownership before the animal was seized by the sheriff under a *fi. fa.* goods issued against S. B. S.

Per BURTON and PATTERSON, JJ. A., [affirming the judgment of the County Court,] that there was not such a continued change of possession

as to satisfy the requirements of the statute, R. S. O. ch. 118, and that the Judge had rightly withdrawn the case from the jury.

Per HAGARTY, C. J. O., and OSLER, J. A.—There being a jury the evidence was such as to require the case to be left to them.—*Pettigrew v. Thomas*, 577.

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